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DICEY: AN AMERICAN COMMENTARY [1]

THIS is an impressive and elegant edition of Dicey's classic work on the conflict of laws as administered in England. It is apparently the product of efficient co-operation. As intimated in the general introduction, the magnitude of the task involved in bringing to date the fifth edition of 1932 inspired the general editor to enlist the assistance of seven 'specialist editors' (Z. Cowen, R. Cross, O. Kahn-Freund, K. Lipstein, C. Parry, R. S. Welsh and B. A. Wortley), who individually have assumed responsibility for sections of the work. It is of interest that, despite the necessitous demands of their primary occupations and the meticulous citation of an extensive accumulation of decisions, statutes, and literature, the task was completed in about one-third the time expended in the preparation of the Restatement of the Law of Conflict of Laws.

The volume is not merely a recasting, but in various respects introduces improvements on the previous edition. A brief chapter on a neglected theme, quasi contracts, and a number of new sections have been added. Additional useful tables, on Foreign Case References, Statutes, and Periodicals, are included. The coverage is more complete but in 234 pages less than in the fifth edition. This has been accomplished by reduction of type size used for the illustrations, elimination of the relatively extraneous chapter on British Nationality (on which a separate publication by Mr. C. Parry is contemplated), and incorporation in the text of such of the material in the appendices in former editions as remains germane. Externally—in cloth, binding, backbone, paper, typography, size, and like details that concern appearance—this is a

[1] *Dicey's Conflict of Laws* (6th ed.). Under the general editorship of J. H. C. Morris, B.C.L., M.A.(oxon.), with specialist editors. London: Stevens & Sons, Sweet & Maxwell. 1949. Pp. cxxix, 912.

distinctly more attractive publication than its predecessors. This appearance is justified by the contents; attentive reading discloses relatively few slips of reproduction indeed, and any who have had experience with the pitfalls of publication will give admiring tribute to the skill and care exercised by the general editor. In short, this is an expert reproduction of the treatise which for some fifty years has been regarded as an authoritative exposition of the English conflicts law.

Indeed, in its special province, the authority of Dicey's treatise on conflicts law has vied with the recognition accorded his even more celebrated works in the fields of public law and legal history. The influence of the treatise has by no means been limited to the use of British practitioners; it exerted in the United States a profound impression upon the writings of the late Joseph H. Beale, and through this channel the views of the English courts, as limpidly synthesized in Dicey's text, have been widely reflected in the doctrines currently developed in this country. And it is no secret that the technique adopted by Dicey to formulate the English conflicts law, in rules supplemented by comment and illustrations, was the model expressly followed in the Restatement of the Law (which, unfortunately and not as originally intended, fails however to include citation and discussion of the relevant cases). Whether this was an appropriate model for a Restatement is of course another question. Even for the civil law countries, as appears from the moving tribute published by Pillet in the *Revue du Droit Public* (Vol. 39, 297, at 298 (1922)) on Dicey's death, the selection of this method by which the English decisions were reduced to a certain number of principles was ' le plus grand service ', enabling Continental jurists for the first time to find their way in the ' labyrinth ' of case law.

In the same notice, Pillet indicates the sources of Dicey's success. These were, first, his unusual intellectual qualities—' la clarté de l'esprit, un gout naturel pour l'ordre qui rendait son argumentation si puissante, et aussi la profondeur '—qualities revealed in the lucidity of his style; second, the choice of a precise method of exposition, already noted; and third, the theoretical *envergure* of his work as set forth in the Introduction. Here for the first time, Pillet notes, is an exposition in an English work of the general bases of the science of conflict of laws. This observation contrasts with the description, in the Preface to the present volume, of *Dicey's Conflict of Laws* as ' essentially a practitioner's book, not a work on theoretical jurisprudence ' (p. xiii), and the, to an American, somewhat amazing bracketing of Beale in the United States and the American Restatement of the Conflict of Laws [*sic*] with the

Continental writers as exponents of the 'theoretical method'. Notwithstanding his much criticised general theories, this characterisation of Beale's work is the more remarkable, in view of the assiduous endeavour in the Restatement and likewise in Beale's treatise to state the common law of the conflict of laws 'as it is'. Even Dicey's programme was not so exclusively positivistic (unless perchance it is supposed that such an effort to formulate the 'common law' of the United States, comprising forty-eight State and several Federal jurisdictions, is doomed to be 'theoretical').

However this may be, there are grounds to ascribe to Dicey the credit and the debit of having oriented the British science of conflicts law on the path of positivism at a relatively early date. In 1879 in the Preface to the forerunner of the *Digest*, The Law of Domicile, Dicey explained this departure from the more cosmopolitan attitudes of his predecessors, *e.g.*, Burge, Savigny, Westlake, as follows:

> 'The law of domicile is often looked at as a branch of the subject called by an unfortunate misnomer Private International Law. In this treatise, however, it is considered solely as a part of the law of England. No attempt is made to determine whether the rules which make up the law of domicil, as administered by English courts, are or are not the same as the rules administered by foreign tribunals, and forming, therefore, part of various foreign legal systems. The treatment here adopted has two advantages. It is, in the first place, convenient for English practitioners, who are in general only concerned to determine what on a given point is the law of England. In the second place, it is correct in point of theory, for it rests on the broad distinction between rules which are strictly laws, as being part of the municipal law of one particular country (our own), and rules prevailing in other countries, which are not laws to us at all, since they do not rest on the authority of our own State; and it completely avoids the errors which have arisen from confusing the rules of so-called Private International Law, which are in strictness "laws" but are not "international", with the principles of international law properly so called, which are "international" since they regulate the conduct of nations towards each other, but are not in the strict sense of the term "laws". The fact that the law of domicil is here treated as a branch of English law should be noted. Foreign authorities, such as Story, Savigny, Foelix, etc., and the judgments of foreign tribunals, are indeed cited; but this is done simply because, in this department of law, the decisions of our courts, or, in other words,

the law of England, will be found, in fact, to be influenced by the theories of eminent jurists, as also by the practice of foreign courts' (pp. iv–v).

The passage, it need scarcely be urged to those who have considered the more recent literature, is seductively incoherent, yet it appropriately expresses the situation of a branch of law composed of rules to guide national courts in more or less 'international' cases. Two centuries earlier, Ulric Huber, whose little tract had considerable influence on English doctrine, sought to resolve the problem created, on the one hand, by the theory of sovereignty and the primordial inclination of practitioners to apply the local law and, on the other, by the justice in conflicts cases of giving some effect to foreign laws, on the principle of comity; Dicey's solution was the also venerable principle of acquired rights. This was doubtless an improvement; as Dicey cogently observed, the application of foreign law is not a matter of caprice or courtesy between sovereigns, nor does the comity doctrine, while perhaps suggesting a motive, throw light on the nature of the rules followed by the courts in conflicts cases. However, as Dicey did not observe, the theory of acquired rights is also in some degree subject to the latter criticism; logically moreover, while denying effect to the foreign law within the domestic forum, it simply assumes but does not explain how the rights acquired by virtue of the foreign law can be valid where that law is not.

It is to be remarked that, in response to the criticism of the acquired rights theory as expounded in the prior editions, the editors of the present edition have revised Dicey's conception to the effect that rights acquired under a foreign law are recognised and, in general, enforced, when that law is *applicable according to the English rules of the conflict of laws.* This concession to the logical criticism of Dicey's doctrine, however, does not meet the more radical objections to the acquired rights principle that have been made by Cook and other advocates of the 'local' law theory, *viz.*, that it ascribes a mystical transmigratory character to rights and does not explain the restrictions found in all civilized legal systems upon the recognition and enforcement of 'foreign acquired rights'.

In an earlier edition, Dicey himself, pointing to the confusion that has resulted in controversies on conflicts questions from failure to distinguish the rule which will be enforced from the motive for its adoption, has supplied one of the keys to this puzzle. The source of the rule, as indeed Dicey supposed, is national—this is the local law doctrine; its motive is international—this is the

principle of foreign acquired rights and indeed also, if less accurately, of comity.

In other words, some combination reflecting both facets of conflicts law is necessary to explain the typical phenomena of a branch of law, the object of which is to define the instances in which reference is to be made to foreign instead of local law.

Apart from these somewhat abstract considerations, the more substantial question respecting Dicey's work is really its positivism, the extent to which it reports only a national jurisprudence. It deals with an area in which, as Dicey himself recognised, international concord respecting the rules is requisite to implement their motive. Is it then just to set forth, even for the guidance of practitioners and judges, only the rules of one legal system as the embodiment of law? From this point of view, the very excellence of Dicey's treatise as an exemplary positivistic exposition of law is one prime reason why in this field of law, basically concerned with the problems of international commerce, the regnant criterion is nationalistic particularism. Obviously, to restore perspective in this sphere, comparative studies are specifically needed, such as Ernst Rabel has undertaken in his monumental survey of the existing conflicts systems.

Beyond these questions, it is not for the writer to assess in detail the fidelity with which this edition reflects the current English authorities—this office is unhesitatingly left to those better qualified. It may, however, be of interest to remark certain features in which the treatment in this work (apart from the inconsiderable coverage of American cases) varies from the pattern across the Atlantic. In the United States, for example, the plurality of jurisdictions does not allow general inclusion of the domestic rules of jurisdiction; these are treated under the head of procedure. On the other hand, it has been customary to regard the constitutional principles and standards delimiting the exercise of power by the courts as constituting a primary branch of the subject, which however is somewhat overlapped by consideration of these same matters in constitutional and procedural treatises. The relevant cases are numerous; in consequence and owing no doubt to the fact that the Due Process Clause and related constitutional provisions invite jurisdictional attacks, direct or collateral, in many conflicts cases, the problems are more amply developed than in the English literature. In certain areas, matrimonial actions and the so-called 'quasi-in-rem' jurisdiction for example, the doctrines that have been adopted contrast markedly with the English rules.

Likewise, in the recognition and enforcement of foreign judgments, although the basic principles are similar, the existence

in the United States of the constitutional requirement that full faith and credit is to be accorded to the public acts, records, and judicial proceedings of other States (of the Union) has resulted in somewhat divergent approaches. While it would seem that to an English jurist the problem of the foreign judgment is how to homologate it with a domestic judgment, the focus of attention in the United States is the delimitation of the situations in which it is to be accorded credit. Accordingly, the refined British legislation on registration and enforcement of foreign judgments as yet has no parallel in the United States, but the treatment of the problems of recognition is both more liberal and more exhaustive in the American law.

Comparison of the treatment of choice of law rules in the text with their American counterparts is less readily reducible to general terms. One has the impression on re-reading Dicey that the English system is at once more flexible, more cognizant of commercial considerations, and more coherent than that of the United States; this must primarily be ascribed to the fact that Dicey and the other English writers concentrate on the materials afforded by a single legal system of a trading country, whereas the problem in the United States is to construct a common doctrine for more than forty-eight systems and chiefly to resolve conflicts of laws within the Federation. With the important exceptions to be noted below, there is much similarity in the conventional common law topics; the striking differences are in what Dicey leaves out or lightly tosses off. Workmen's compensation, insurance (except marine insurance), commercial arbitration, foreign corporations, wrongful death actions, will serve as illustrations of fields in which the problems presented to the courts of England apparently have not occurred with sufficient frequency to justify or to permit instructive formulation in a treatise that reflects the English positive law. Such a treatise necessarily inherits the deficiencies of the source materials to which it is limited, which deficiencies are bound to be relatively striking in a system and in an area where legal principles are casually pricked out from case to case according to the accidents of judicial legislation.

In many respects, the most interesting divergencies in the choice of law rules of the English as compared with the American legal system are to be found in the important area of obligations. In the case of contracts, the ' proper law ' doctrine enables the English courts, except as constrained by precedent or statute, to assume large discretion in determining the application of foreign law to commercial contracts in accordance with the facts; this practice of precise individualisation has fostered the development of an

instructive body of decisions, responsive to mercantile needs and liberally recognising the power of the parties to anticipate the law of the contract in maritime and other transactions of international commerce. In contrast, the general disposition in the United States has been to resolve conflicts arising in connection with contracts at least ostensibly on principle, but absence of agreement on the basic premises and the availability of competing criteria, too often mechanically construed, have caused considerable confusion with respect to the applicable law in certain situations. The difficulties are compounded by the fact that, in particular areas, of which insurance is a notorious instance, deference to the interests of the business activity in question is superseded by a definite inclination to regard it as a sphere to be regulated for the protection of the consumer, even with respect to choice of law. These difficulties the English solution avoids; the ' proper law ' principle is in effect that there should be no principle, except of course as decision may be circumscribed by statutory prescription, controlled by meticulous observance of precedent, or facilitated by presumptions that may be resorted to where the parties have not stipulated the governing law and the inferences to be drawn from the facts attending an international contract are obscure. Both systems entail a substantial margin of uncertainty, but the superiority of the English technique suggests that pragmatic empiricism, administered by an able judiciary, has advantages over a plethora of competing principles.

In view of the broad recognition in the English doctrine of the propriety of referring to foreign law to define rights arising under foreign contracts and the subordination of considerations of local policy in dealing with such cases, it is remarkable that a contrastingly illiberal principle is apparently established with respect to foreign torts. While the laws of the United States and of virtually all other civilised systems save the British refer to the *lex loci delicti commissi* as the primary measure of liability in tort cases, subject of course to the secondary incidence of the *lex fori* with respect to questions of procedure or public policy, the law of England, as stated by Dicey and other authorities, is embodied in the propositions that, to be actionable in England, the foreign tort must be an act both (a) ' which, if done in England, would be a tort ' and (b) ' not justifiable, according to the law of the foreign country where it was done '. As Dicey expressly states, the foreign tort recognisable as a basis of action in English courts, supposes a species of double liability, primarily under the local torts law of England on the hypothetical assumption that the foreign

tort was committed in England, secondarily under the foreign law, which is relevant to show the 'innocence' of the alleged tortfeasor.

Analytically, as Falconbridge and others have duly noted, this notion of an ambivalent liability, implicit in the choice of law rules respecting torts, is on its face peculiar. What is worse, as the writer has recently suggested elsewhere (27 Canadian Bar Review 116–122) in reviewing Falconbridge's *Essays on the Conflict of Laws*, the evidence is that this doctrine espoused by Dicey involves a gratuitous misconstruction of the celebrated opinion of Mr. Justice Willes in *Phillips* v. *Eyre* ((1870) L.R. 6 Q.B. 1), from which the two commonly cited rules governing foreign torts are taken. By way of summary and without repeating the details set forth in the above review, it may be noted :

(1) That the basic premise of liability in tort, like that in contract, in the opinion of Mr. Justice Willes referred to, is that 'the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law'.

(2) That the two rules in question are stated in the opinion as *conditions* that must be fufilled 'in order to found a suit in England for a wrong alleged to have been committed abroad'.

(3) That the term 'actionable' in the first condition was apparently derived from a passage in Selwyn L.J.'s opinion in *The Halley* ((1868) L.R. 2 P.C. 193), reproducing a comment in *Smith's Leading Cases*, included in that work at a time when Mr. Justice Willes was co-editor and using the term in its natural sense as 'cognisable' or 'triable,' not as referring to substantive 'liability'.

(4) That, in the seventh edition of *Smith's Leading Cases* (1876) first appearing after *Phillips* v. *Eyre* and in connection with which Mr. Justice Willes was consulted before his death in 1872, no reference is made to the two rules, but the language of Willes J. is quoted as declaring the parallel bases for conflicts purposes of liability in tort and in contract.

(5) That the peculiar construction of the first rule accepted by Dicey was apparently first formulated in a dictum of Mellish L.J. in *The M. Moxham* ((1876) L.R. 1 P.D. 107, at p. 113), and is reinforced only by a few dicta in *The Halley* ((1868) L.R. 2 P.C. 193) and later cases, which however, should not be too formidable to overrule in view of Viscount Haldane's observations in *Canadian Pacific Railway Company* v. *Parent* ([1917] A.C. 195 (P.C.)).

(6) That the second rule allowing 'justification' by the foreign law was apparently, *ex abundantia cautelae*, included by Mr. Justice Willes as stating the settled doctrine of a long line of precedents dating from the seventeenth century; however, it was never held to require a showing of 'innocence' under the foreign law until 1897 in *Machado* v. *Fontes* ([1897] 2 Q.B. 231). This decision, inconsistent with the above construction of Mr. Justice Willes' opinion in *Phillips* v. *Eyre*, followed the views unnecessarily expressed by Wightman J. in *Scott* v. *Seymour* ((1862) 1 H. & C. 219), which on the above analysis might be regarded as discounted by *Phillips* v. *Eyre*.

The above suggests that the isolated and irrational position of English law respecting the law governing tort liability is due to misapprehension of the leading case. Manifestly, the two *conditions* for the recognition in English courts of liability in tort derived from the law of the place as conceived by Willes J. were taken out of their context and mechanically applied as independent rules. This apparently has led to the otherwise unaccountable confusion of right and remedy and the curious notion of double liability in the formulation of the conflict rules respecting torts by Dicey and others. If so, the episode will serve to illustrate the pertinence of the observation made long ago by Paulus : *non ex regula ius sumatur* (D.L. 17.1).

Theoretical considerations aside, the specific effect of this anomalous doctrine is to inflate the sphere of the *lex fori* and correspondingly to reduce recognition of foreign acquired rights. In this respect the doctrine obviously is incoherent with Dicey's basic theory respecting choice of law. This leads to an allied observation on the still wider problem of the scope of the category of procedure in Dicey's scheme. To an American observer, his consideration of this most important restriction on the extent of reference to foreign law is cavalier. Notice the propositions enunciated : that 'English lawyers give the widest possible extension to the meaning of the term "procedure"', that the category 'includes all legal remedies and everything connected with the enforcement of a right', and that where a statute affects both the right and the remedy it is procedural. Accordingly, the *lex fori* governs not merely the whole field of practice, but in addition 'the question of set-off and counterclaim, the whole law of evidence, as well as every rule in respect of the limitation of an action or of any other legal proceeding for the enforcement of a right'. It is not possible in a review to exhibit the implications of such sweeping assertions. But at least it may be remarked that the definition

of ' procedure ' as including *everything* connected with the enforcement of a right is naive; is not the substantive law therewith connected? And that for the foremost exponent of the acquired rights doctrine thus without demur to distend the incidence of the *lex fori*, appears tantamount, metaphorically speaking, to inviting not a gnat but a whole procession of procedural camels into the tent.

These observations on lesser segments of Dicey's work are not to be taken to discount his achievement. The scheme of choice of law rules elaborated in the Digest has great historic and intrinsic values; of prime importance are the basic, generous recognition of foreign law as the measure of foreign claims, the realistic emphasis upon the municipal or private law orientation of conflicts problems, and the salutary subordination of their international or public policy aspects. While the premises of the scheme deserve restatement in more modern terms and their application to foreign torts and in the definition of ' procedure ' has been asymmetrically stunted by the undeveloped state of the pertinent English precedents, the essential point is made clear that the critical standard for the adjudication of foreign cases is the foreign law. Dicey as the authentic expositor of the commercially enlightened English judicial decisions of the latter half of the nineteenth century had the genial insight to recognise this as the central desideratum in dealing with the perplexing conflicts of laws arising in international commerce.

It is not possible here to notice the many other outstanding features of this revision, such, for example, as the judicious, illuminating résumé of the questions of characterisation and renvoi. These are left for the reader to discover, who will undoubtedly in so doing recognise the debt that all who are interested in conflicts law owe to the editors and publishers for having in this most valuable edition brought to date Dicey's classic work.

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THE INTERPRETATION OF WAR UNDER PRESENT INTERNATIONAL LAW

The principal aim of any legal system is the guarantee of peace. Peace is guaranteed by forbidding, in principle, the use of force. Force is made the monopoly of the community constituted by the legal order and may be taken only for those purposes and in the manner prescribed by this order. A status of relative, not absolute, peace is achieved by proscribing the use of force except when taken as a measure in support of the law. The most elementary, and the most important, distinction that any system of law must take therefore, is the distinction between the lawful and unlawful use of force. In this light the legal interpretation of war still appears as the central problem in international law.

The attempts to distinguish between the lawful and the unlawful resort to armed force have always encountered two problems of a fundamental nature. Given the decentralised status of international law, and consequently the absence of a centralised judicial organ competent to determine in given instances violations of the law, who is to determine, in the event of a resort to armed force, whether a State has acted in violation, or in support, of the law? And even assuming that this decision could be made, in the absence of centralised coercive agencies ready to take quick and decisive enforcement action, there is no assurance that the lawbreaker can be dealt with successfully. For any attempt to interpret war as a sanction, in the absence of the centralisation of the executive function, must rest upon the interpretation that the counter-war of the State illegally attacked can technically serve as a sanction. But for technical reasons alone it is doubtful whether a counter-war can be so interpreted, since there is no guarantee that the State waging the counter-war will prove to be stronger than the aggressor. This problem has its analogy in the State only in the relatively rare instance of revolution. In the international order it has unfortunately been much more common.

These difficulties not only go to the heart of the problem of the legal interpretation of war but have also constituted the real objections made against the consideration of international law as a true system of law. Yet it is a curious fact that although international jurists have always been aware of these difficulties they have only been brought squarely to the fore when treating the

problem of the legal interpretation of war. The traditional attitude toward acts of force falling short of war is a case in point. It is quite evident that the same fundamental objections urged against the doctrine that war must always be considered as either an international delinquency or an international sanction have been applicable, in full, in those cases in which acts of force short of war were taken. The use of force in every instance has never been considered outside the pale of international law. On the contrary the majority of writers have held that the use of force in every instance except when constituting war could be characterised as legal or illegal. Authorities have differed little over the principle that respect for a State's internal and external independence rendered acts of force, short of war, illegal unless justified by special circumstances. Acts of reprisals constituted the special circumstances, that is acts taken by one State as a reaction against another State's violation of an international legal duty. And reprisals have been considered as including such acts as the seizure of ships sailing under the delinquent State's flag, blockade, or even the military occupation of a part of the delinquent State's territory.[1]

The State is its own judge in the event of its taking reprisals against a claimed international wrong; and there is no certainty that acts of reprisal will successfully operate technically as a sanction in a given instance. Yet it was just this uncertainty, produced by the decentralisation of international law, that was so instrumental in bringing about the refusal of many writers to consider war as either legal or illegal.

The doctrine that was generally accepted until quite recently concerning the interpretation of war proved in many respects most interesting. It demonstrates, above all, the ingenuity of the jurist to fashion a theory which would, in spite of almost insuperable difficulties, somehow seek to reconcile international law, as a system of law, with the facts of international life.

To begin with, a distinction was made between acts of force falling short of war and war itself. To be sure there was never unanimous agreement on just where the dividing line was to be placed, or the exact criteria for defining war. Aside from this question however, it was said that when international law appeared to regulate the conduct of States it, so to speak, 'founded' the institution of war. International law had nothing to do with the creation of this institution, it simply recognised that this unfortunate fact or event occurs periodically. In the absence of war

[1] Oppenheim, *International Law* (6th ed., rev. Lauterpacht, London, New York, 1944), II, p. 113.

the behaviour of States is regulated by the international law of peace. But should war break out international law made no judgment on the legality or illegality of the transition period from peace to war. The act by which one State resorted to war against another State, was regarded by most publicists as neither legal nor illegal but in Sir Arnold McNair's term 'extra-legal'.[2] Once war had broken out an emergency law of war and neutrality came into operation.

It is true that the outbreak of war could involve the breach of a specific treaty obligation, and in this instance there was a substantial opinion that the resort to war would then be regulated by law. But such instances were of an exceptional nature.

That the act of resorting to war could be extra-legal, just as an event occurring in nature can be extra-legal (earthquake, flood, etc.), is quite difficult to see. The act of resorting to war is certainly not a natural event but, most thoroughly, a social action—it is performed by individuals. As such it must either be permitted or forbidden under international law, it must either be legal or illegal. There appears to be no other choice. It is true, however, that a certain action may be permitted in a negative sense, that is it may not be authorised by the law in a positive way, yet at the same time it is not legally forbidden since the law attaches no specific consequences, especially a sanction, to the commission of the act. Nevertheless the act, in this latter instance, must be regarded as legal. This would seem to be the proper interpretation of the 'extra-legal' interpretation of war.

That this concept of war was plainly at variance with the principal function of international law is clear. On the one hand the principal function of international law is the delimitation of the respective spheres of competence of the various States. On the other hand the traditional doctrine held toward war in effect denied this function by allowing (in a negative sense to be sure) one State to resort to war against another State and to destroy completely the latter's independence. How it was possible for a system purporting to be one of law to guarantee the legitimate sphere of interests of States and yet allow, in the event of war, the

[2] Sir Arnold McNair, 'Collective Security', *British Yearbook of International Law*, XVII (1936), p. 152. The distinguished American international jurist, Professor Quincy Wright, summarised this attitude held toward war as follows: 'Under international law, therefore, war is not a lawful institution, but an event, an unfortunate event, like invasion under municipal law, which renders the operation of normal law impossible and makes application of an emergency law of war and neutrality a *pis aller*'. 'Changes in the Conception of War', *American Journal of International Law*, 28 (1924), p. 761.

unlimited interference of one State in the sphere of interests of another, was never satisfactorily explained.[3]

Although the doctrine of the just war never completely disappeared from the writings of publicists, since the end of the nineteenth century it received the support only of a very small minority. The origin of the view that war must either be considered an international wrong or as a legal remedy of self help taken against an international wrong need not be examined here. It is of importance to note, however, that historically the concept of the just war was not based upon the positive law alone as a recent writer has remarked,[4] but included elements of natural or moral law as well.

In recent years perhaps the most notable advocate of the revived theory of *bellum justum* has been Professor Kelsen. But Professor Kelsen has used the doctrine of *bellum justum*, according to his declared intention at least, only as an instrument to interpret the positive law. In his words the theory of *bellum justum* holds that ' according to general international law war is forbidden in principle. It is permitted only as a reaction against an illegal act, a delict, and only when directed against the State responsible for this delict. As with reprisals, war has to be a sanction if it is not to be characterised as a delict '.[5]

The chief value of Kelsen's writings on the subject of the legal interpretation of war may be seen in the fact that he has assisted greatly in helping to force the issue, in showing the almost incredible contradiction of a legal system supposedly regulating the behaviour of States but apparently incapable of drawing the most important legal distinction, that between the lawful and unlawful use of force when such force reaches the proportion of war. Still further, Kelsen's attempt to interpret war according to the *bellum justum* doctrine has led him to consider the basic characteristics of international law as a system of law. The result has been the valuable

[3] Some writers have attempted to account for this by maintaining that war serves a legislative function in international law, or corresponds to the act of revolution in the State. See Anzilotti, *Corso di diritto internazionali* (1914–15), III, p. 183. As to the argument that the counterpart of war in the State is revolution, it must be remembered that until the revolution succeeds it constitutes, from the point of view of municipal law, unlawful acts of violence. But according to the traditional concept of war, the resort to war was not illegal at any time, whether successful or not. Cf. Professor Lauterpacht's remarks: ' As a means of changing the law, it (war) constituted a radical break in the continuity of the system of International Law and was analogous to an authorisation of a revolution in the very constitution of a State '. Oppenheim, *op. cit.*, II, p. 146. And Professor Brierly's lucid discussion in *The Outlook for International Law* (Oxford, 1944), pp. 19–21.

[4] Cf. Joachim von Elbe, ' The Evolution of the Concept of Just War in International Law ', *American Journal of International Law*, 33 (1939), pp. 665–688.

[5] Hans Kelsen, *General Theory of Law and State* (Cambridge, 1945), p. 331.

interpretation of international law as a kind of primitive law. Both the international legal order and the primitive legal order are essentially characterised, according to Kelsen, by the fact that they are decentralised legal orders. There is the absence of centralised organs competent to apply the law and determine in a given instance whether or not it has been violated, and the absence of executive organs to enforce the law by taking centralised coercive measures. As a consequence the institution of self-help prevails. The subjects of the law themselves must also apply and enforce the law; and in enforcing the law these acts may be interpreted as coercive measures taken on behalf of the legal community. Nevertheless Kelsen has maintained that the difference between a centralised and a decentralised, an advanced and a primitive, legal order is a difference of degree not of kind. In both types of legal systems it is possible to say that the use of force is the monopoly of the community constituted by the legal order, to be used only under those conditions described by this order. As the act of killing in the primitive legal order can be described either as a delict or as a sanction, so war in international law may be described as either an international delinquency or as an international sanction.

Still the question must be raised, is this difference between centralisation and decentralisation simply a matter of degree? Does it only illustrate, as Kelsen says, the technical deficiencies of international law as a system of law? Is a so-called system of law, in which each member interprets the law and, accordingly, acts upon his interpretation, merely technically deficient? Or are we here faced with a difference of degree that results in a difference of kind? Kelsen himself has quite candidly admitted that the practical application of the distinction he draws may in a concrete instance be quite difficult, if not impossible. States have rarely admitted that they have acted in violation of the law. And in the absence of such an admission both parties are equally entitled to interpret the law. This dilemma is especially striking when the case is considered in which the resort to war involves the violation of an international treaty to which the belligerents are contracting parties, since in this instance the decision as to whether the law has been violated must be made by the State which is itself a contracting party to the treaty.

The conclusion is difficult to avoid that a system of law which allows each subject to take this law into his own hands leaves perhaps too much to be desired. It is scarcely a system of law which offers a minimum degree of certainty in its application, or, not

least of all, a system that guarantees the protection of the weak, under law, against the strong.[6]

Any attempt to bring war under the control of law in the sense of outlawing it, in principle, and allowing it as a sanction to be taken only as a reaction against certain violations of the law can follow, generally speaking, along certain lines.

The most satisfactory approach, short of the creation of a world State, would require the establishment of a universal international organisation under which the use of armed force is strictly denied to the individual members to be taken on their own initiative. Decisions as to the violation of international obligations are to be made by a central organ as are also those decisions with respect to the taking of enforcement action. Members are not only obligated to abide by the decisions of these central organs as to a violation of the law but are further obligated to place armed forces at the disposal of the organisation for the taking of enforcement action. Here the monopoly of the use of force is truly centralised and the principle of self-help forbidden.[7] There can be little doubt but that under these circumstances all acts of force can be characterised as either illegal acts of violence or as sanctions taken by the international order.

Any treaty attempting to establish that resort to war will be regarded as either a delict or a sanction, but failing to centralise the judicial and executive functions, is open to those same objections considered in previous pages. Is it enough for a treaty to simply establish 'objective criteria' which render war in every, or almost every, instance as either legal or illegal? In the absence of a central organ to interpret and apply these objective criteria each of the contracting parties is equally entitled to perform this function. And in this case the objective criteria are all too often subjectively evaluated by each contracting party according to its own particular interests. Still further, the decentralisation of the enforcement function provides no certainty that the lawbreaker will be punished. This is especially apparent in the type of treaty in which the contracting parties may, but are not obligated to, take coercive measures against a violator, even after they have decided that an illegal resort to war has occurred. In this connection the Covenant of the League of Nations and the Kellogg-Briand Pact should be considered.

[6] On this point see Professor Lauterpacht's *The Function of Law in The International Community* (Oxford, 1933), p. 433.

[7] It is possible however that under such an organisation self-defence against an armed attack would be permitted until such time that the organisation could take proper action. The important point is that the organisation will, in every instance, finally act and that the act of self-defence will be subject to review.

The security system established under the Covenant of the League of Nations constituted a very modest approach to the problem of ensuring that force should only be used as an instrument in support of the law. According to the provisions of the Covenant the members were not prohibited in principle from using force in the conduct of their international relations.[8] They were not even prohibited, in principle, from resorting to war against one another. What was attempted under the Covenant was simply to establish that the 'resort to war' was forbidden under certain, but not all, circumstances.[9]

The obligation not to resort to war in Article 16, paragraph 1, of the Covenant could be interpreted as permitting the taking of acts of force which fell short of war. In addition, Article 15, paragraph 7, of the Covenant reserved to members the 'right', in the event the Council failed to reach agreement on the solution of a dispute submitted to it, 'to take such action as they shall consider necessary for the maintenance of right and justice'. Thus the members had the choice between maintaining right—*i.e.*, international law—or maintaining justice. The latter may but need not be in conformity with the former, since justice and law are not necessarily identical.[10] There were other 'gaps' in the Covenant by which a would-be aggressor could have resorted to war without violating the letter of the Covenant. But these weaknesses of the Covenant were overworked; experience has shown that the dimensions of these 'gaps' have been exaggerated. Professor Brierly has observed correctly that none of the wars that occurred during the period of the League was initiated by means of one of the gaps, but instead 'all of them have either involved direct breaches of a State's obligations under the Covenant, or would have done so if the aggressor had been a member of the League'.[11]

The real weakness of the Covenant is to be seen in its far-reaching decentralisation. The decision as to whether a member

[8] There are certain writers however who have interpreted the obligation established in the Covenant, not to 'resort to war' under certain circumstances, as including acts of force falling short of war. Thus Professor Brierly has stated: 'It would not, I think, be straining the interpretation of the phrase "resort to war" to say that it means "resort to warlike acts" whether or not these acts lead as a legal consequence to a state of war'. 'International Law and Resort to Armed Force', *Cambridge Law Journal*, 4 (1932), p. 314. But see Oppenheim, *op. cit.*, II, pp. 125–31.

[9] Cf. Report on the Economic Weapon presented by the Third Committee to the Assembly, 1921, League Document A.14, 1927, V, p. 32, for one interpretation of what constituted 'resort to war' as defined in Article 16, paragraph 1 of the Covenant.

[10] Professor Kelsen's interpretation that Article 15, paragraph 7, permits only a just war, that is a war waged as a reaction against a violation of internationa. law, and accordingly confirms the theory of *bellum justum* does not seem acceptable. Cf. *General Theory of Law and State*, p. 334.

[11] *The Outlook for International Law*, pp. 63–64.

of the League had resorted to war in violation of its obligations was to be taken by each member acting independently. The Council could give its opinion as to whether a breach of the Covenant had occurred, but its opinion was not binding upon members of the League.[12] The sanctions provided for in the Covenant were also of a decentralised character. According to the express provisions of the Covenant each State was obliged to take those economic sanctions stipulated in Article 16, paragraph 1, once it had made the decision that a 'resort to war' in violation of the Covenant had occurred.[13] But the actual carrying out of this obligation was left to the individual members. The military sanctions provided for in the second paragraph of Article 16 were of an optional nature. The Council could recommend military measures, but the members were under no obligation to accept these recommendations.

If, however, we presuppose that this decentralisation does not rule out the possibility of a legal interpretation of war it is evident that the Covenant marked a real step forward in the attempt to delegalise war except when waged as a sanction in support of the law. For the Covenant at least established the obligation that a State before it could resort to war had to fulfil certain conditions. These conditions, even though applied by the members individually, were quite clearly set forth. Criteria, the existence of which was largely a matter of dispute prior to the first World War, were therefore established which did make possible the interpretation that certain wars were illegal and that counter-wars served as international sanctions. There is no doubt that those wars the Covenant directly authorised were wars waged against a State violating its obligations under the Covenant. And the Covenant at least avoided that unfortunate mistake, not avoided in the Kellogg–Briand Pact and the Charter of the United Nations, of

[12] It must be emphasised that the Council must not take any decision as to whether a breach of the Covenant had taken place; its duty is merely to give its opinion.' League Document, A.14, 1927, V, p. 33. The President of the Assembly in the Italo-Abyssinian case declared: 'It must be made clear that no organ of the League has power to decide, in such a way as to bind all the Members, that one of them has violated the Covenant. That obligation derives directly from the Covenant and must be observed by Members of the League in virtue of the respect due to treaties'. *British Yearbook of International Law*, XVII (1934), p. 58–59 (quoted by Sir John Fischer Williams, *Sanctions Under the Covenant*); *Sanctions*, The Royal Institute of International Affairs; Information Department Paper, No. 17 (1935), p. 7–17.

[13] By 1939 it was generally conceded that even the economic sanctions had lost, through past practice of League members, their obligatory character and should be considered as optional. For a declaration to this effect by a group of smaller States meeting at Copenhagen in July of 1938 see *Acta Scandinavia*, 9 (1938), p. 128. Lauterpacht appears to agree with this interpretation. Cf. Oppenheim, *op. cit.*, II, pp. 137–143.

denying to members the opportunity of resorting to measures of self-help against a violation of the law while at the same time failing to provide for the compulsory settlement of all disputes, and the enforcement of decisions reached in such settlement. While the resort to war as a means of self-help against a violation of international law, when the violation itself did not constitute the illegal resort to war, was temporarily denied members it nevertheless could be resorted to if the State violating an international obligation did not submit to that procedure prescribed by the Covenant. And there was every reason for assuming, an assumption experience has vindicated, that the delinquent State would not submit to that procedure.

The General Treaty for Renunciation of War, the so-called Kellogg–Briand Pact, provides a remarkable example of the futility of an international instrument which attempts to render the resort to war illegal except when taken as a measure of self-defence against an illegal resort to war, but takes no steps toward the solution of those problems which otherwise makes the validity of such attempts problematic. All the important weaknesses of international law are given express recognition in the Pact's provisions. Yet it attempted the solution of a problem the existence of which was largely the result of those very weaknesses it expressly recognised.[14]

The Pact went much further than did the Covenant in prohibiting the resort to war.[15] In Article 1 war was renounced by

[14] The Preamble, in part, and the first two Articles of the Pact run as follows:

'Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits of this Treaty;

'I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy with one another.

'II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.'

[15] Whether the signatories also renounced recourse to measures of force short of war has been a controversial question. Those who interpret the Kellogg Pact as prohibiting the use of force even when taken as a reprisal point to Article II which obligates contracting parties never to seek the solution of disputes except by peaceful means. (See, for example, 'Budapest Articles of Interpretation', International Law Association, *Report of the 38th Conference.*) On the other hand it has been claimed that although 'measures of force short of war are compulsive means, they are still pacific means'. Oppenheim, (Lauterpacht), *op. cit.*, II, p. 152. (Also see, in this connection, Lauterpacht's 'The Pact of Paris and the Budapest Articles of Interpretation', *Transactions of the Grotius Society*, XX (1935), p. 183). Besides, Article II does not state that the contracting parties must settle their dispute by peaceful means but only that they shall seek settlement by peaceful means. The interpretation that reprisals are forbidden by the Pact of Paris would appear to go too far.

the contracting parties as an 'instrument of national policy'. This has led to the interpretation that war was not forbidden as an instrument of international policy. But what constitutes war 'as an instrument of international policy'? It is clear that enforcement measures taken under then existing international arrangements (principally measures taken under the Covenant and the Locarno Pact) came under this category. Some writers have gone further in their interpretation.[16] Professor Kelsen has interpreted this provision to imply that the Pact allowed a war waged as a reaction against a violation of international law (and not necessarily, or in addition to, an illegal aggression) since such a war would be waged for the maintenance of international law and, hence, would constitute a war not of national but of international policy.[17] This interpretation while not excluded is doubtful.[18] For Article II obligates the parties to seek the settlement of all disputes 'of whatever nature or whatever origin' only by pacific means. Besides, Professor Kelsen has presupposed, in making his interpretation, that the resort to war as a measure of self-help, when taken as a reaction against an international wrong, is an international action because it is recognised as a legal remedy under international law. But it is just this presupposition that is a matter of dispute.

The most reasonable interpretation is that the Pact did prohibit the resort to war as an instrument of self-help against any violation of the law. Only a special case of self-help was permitted—self-defence—against a specific violation of the law—the illegal resort to war. In the Preamble of the Pact it is stated 'that any signatory Power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits furnished by this Treaty'. The Pact thus extended the right of self-defence by permitting other contracting parties the right to collectively assist the State acting in self-defence.[19] The similarity between this provision in the Pact's preamble and the 'collective self-defence' provision

[16] In this connection Hans Wehberg asks '. . . whether it is right to forbid war only as a means of national policy. This formula may give rise to the interpretation that war shall be permitted under certain conditions, for example as a means of "international" policy, as a means of asserting a religious dogma, a philosophy of life, or as a means of crushing the Soviet Union'. *The Outlawry of War* (Washington, 1931), p. 76.

[17] *General Theory of Law and State*, p. 334.

[18] It does not appear to receive support from the official correspondence and interpretations of the Pact. Cf. *General Pact for Renunciation of War, Text of Pact as signed, Notes and Other Papers* (Washington, 1931).

[19] The declaration of war by Great Britain and France against Germany in September, 1939, was therefore in full conformity with the provisions of the Pact of Paris.

in Article 51 of the Charter of the United Nations should be noted.

According to the provisions of the Pact each contracting party had the right to judge whether resort to war in self-defence was necessary since the Pact did not provide for this decision to be reached by a central organ. Professor Lauterpacht has stated that 'elementary principles of interpretation preclude a construction which gives to a State resorting to an alleged war in self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action'.[20] Yet it is difficult to see how else this question was to be ultimately determined. The Paris Pact did not provide for the submission of disputed instances of self-defence to judicial review, which Professor Lauterpacht himself asserts. The other contracting parties could of course judge in each particular instance whether a State allegedly acting in self-defence was really acting in accordance with the law. But their opinions were no more valid than the opinions of the States directly involved. If by 'elementary principles of interpretation' Professor Lauterpacht means that self-defence only becomes legally meaningful in a system in which acts of alleged self-defence are ultimately brought before judicial review he may be, and probably is, correct. It is just for the reason that in international law self-defence usually cannot be brought before ultimate review that there is strong doubt as to whether it can properly serve as a sanction.

In close connection with this point is the opinion of many writers that the Kellogg-Briand Pact provided no sanctions in the event of its violation[21]; the only effect of the Preamble being to reassert the rule of international law that a contracting party in violating the terms of a treaty gives the other contracting parties the right to cancel their obligations under the treaty with respect to the violator. But this interpretation is correct only in so far as a war of self-defence is not interpreted as having the character of a sanction.[22] This indeed appears to be the basis for the interpretation—that even when States do create international instruments outlawing aggressive war, such as the Pact, war can serve as a sanction only when the decision as to a violation of this instrument has been taken out of the hands of the contracting parties and entrusted to a superior tribunal.

[20] Oppenheim, *op. cit.*, II, p. 155.

[21] For example, Oppenheim (Lauterpacht), *op. cit.*, II, p. 157; Wehberg, *op. cit.*, p. 83ff.

[22] This interpretation must also reject a war of 'collective self-defence'—that is a war waged by other States in defence of the attacked State—as having the character of a sanction, since the Pact allowed this type of war as well. This point is of importance since the Pact of Paris parallels, in this respect, Article 51 of the Charter of the United Nations.

Still further there were no measures providing for the collective enforcement of the Pact's obligations. Contracting parties were not obligated to take measures of any sort, economic or military, even after they had decided that the Pact had been violated. Yet many of the objections raised against the Pact could be equally raised against the Covenant. The chief difference between the two in this respect is that whereas under the Covenant members were obliged to take measures of an economic character once they had decided that the Covenant had been violated, under the Pact of Paris contracting parties were not obliged to take any measures. There was the same right of self-defence under the Covenant, the decision as to the necessity of self-defence to be taken by each member acting individually.[23]

The Kellogg–Briand Pact did not possess, however, many of those worthwhile features to be found in the Covenant. Although Article II of the Pact stated that the settlement of all disputes or conflicts ' shall never be sought except by pacific means ' there was no specific obligation that the contracting parties *must settle* their disputes, especially by submitting them to an international tribunal for binding settlement. This was a very serious deficiency of the Pact of Paris since it forbade a war of self-help taken against an international wrong, but provided nothing to take its place. The result of this situation was that the Pact could be used to protect a State evading its international obligations, since the injured State had neither the right to demand compulsory judicial settlement of the dispute nor the right to resort to war in self-help. All this was not possible under the Covenant.

At the close of the recent World War the problem of the legal interpretation of war appeared to many writers, not unreasonably, to have lost much, if not all, of its former importance. Those contracting Powers to the London Agreement, which created the International Military Tribunal to try the former German officials for ' crimes against peace ', took for granted that a distinction was to be made in international law between the just and the unjust—the lawful and the unlawful—war. It can easily be shown that both

[23] The practice of the League in later years of claiming the right to pass ultimately upon alleged acts of self-defence may be taken as an exception to the statement made above. While this practice was not in strict accordance with the provisions of the Covenant, and while the decisions reached were not binding upon members, it must nevertheless be looked upon as a significant step in the development of the right of self-defence in international law. On this point and the concept of self-defence under the Kellogg-Briand Pact and the Charter of the United Nations as well see Professor F. B. Schick's article ' Peace on Trial—A Study of Defence in International Organisation ', *The Western Political Quarterly*, II, No. 1 (1949), pp. 1–44.

the Charter of the International Military Tribunal and the Nuremberg Indictment were based on the *bellum justum* doctrine.[24] In his report to the President on June 7, 1945, Justice Jackson criticised the predominant attitude held toward war in the twentieth century as ' a departure from the doctrine taught by Grotius . . . that there is a distinction between the just and the unjust war—the war of defence and the war of aggression ',[25] and in his opening address before the Nuremberg Tribunal the United States Prosecutor again referred to that ' foul doctrine ' which failed to differentiate between just and unjust wars.[26] Indeed the significance of Nuremberg is not to be seen in the attempt to distinguish between the lawful and unlawful war, but in the attempt to go one step further in establishing the individual criminal responsibility of those officials of a State who plan, prepare, and wage a war in violation of international law.[27]

During this same period of the Nuremberg Trial the second attempt at world organisation in the twentieth century was initiated through the establishment of the United Nations. The principal purpose of the United Nations was declared to be the maintenance of international peace and security and to that end the Organisation

[24] Article 6, paragraph A, of the Charter of the International Military Tribunal speaks of a ' war of aggression or a war in violation of international treaties, agreements, or assurances '. There can be no doubt but that Germany was guilty of waging a war in violation of international treaties. By attacking Poland, for example, Germany violated the Kellogg-Briand Pact and a non-aggression pact concluded with Poland. But what is the basis for the phrase ' war of aggression ' ? The most reasonable interpretation is that the charge ' war of aggression ' is based on the *bellum justum* doctrine, in view of the fact that the wording of Article 6, paragraph A, distinguishes between the act of waging a war of aggression and the act of waging a war in violation of international treaties. Either the phrase ' war of aggression ' must be considered as superfluous and even misleading, which evidently was not intended, or it must be concluded that a distinction was made between the just and the unjust war. Still further, Count II of the indictment at Nuremberg against the defendants reads, in part, as follows: ' All the defendants with divers other persons, during a period of years preceding May 8, 1945, participated in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances '. Cf. *Trial of Major War Criminals Before The International Military Tribunal* (Nuremberg, 1947), I, p. 42.

[25] Report to the President from Justice Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals. Text in *American Journal of International Law*, 39 (1945), Official Document, p. 187.

[26] *Trial of Major War Criminals before the International Military Tribunal*, II, pp. 144–5.

[27] International jurists have differed considerably in their evaluation of Nuremberg. See, for example, Leo Gross, ' The Criminality of Aggressive War ', *American Political Science Review*, XLI (1947), pp. 205–226; George A. Finch, ' The Nuremberg Trial and International Law ', *American Journal of International Law*, 41 (1947), pp. 20–37; Hans Kelsen, ' Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? ', *International Law Quarterly*, (1947), pp. 153–71. On the other hand see Quincy Wright, ' The Law of the Nuremberg Tribunal ', *American Journal of International Law*, 41 (1947), pp. 38–72, and other writers cited therein.

was empowered in Article 1 of its Charter ' to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace '. The members of the Organisation were obliged to ' settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered ' (Article 2, paragraph 3). And they were obligated further to ' refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations ' (Article 2, paragraph 4).

In order to ensure that effective collective action could be taken by the Organisation the members conferred upon the Security Council primary responsibility for the maintenance of international peace and security and agreed ' that in carrying out its duties under this responsibility the Security Council acts on their behalf ' (Article 24). Thus a significant degree of centralisation was achieved in conferring upon the Security Council not only the authority to make binding decisions on the existence of a threat to, or breach of, the peace but also the authority to decide what action, including the use of armed force, should be taken (Articles 39, 40, 41, 42). Last of all, provision was made for armed forces to be placed at the disposal of the Council (Articles 43, 45, 46, 47, 48, 49).

Does the centralisation achieved in the Charter permit us to say that henceforth the use of force may be described, with a degree of certainty, as either an international delinquency or an international sanction? The answer to this question must be considered from two points of view. The first is based upon the assumption that the Charter can operate as originally intended, that the actions of the Security Council will not be paralysed by use of the veto—an assumption which now appears highly improbable. But even if this assumption is made it may be doubted whether the enforcement actions provided for in the Charter have the character of true sanctions. It is, of course, not the lack of centralisation in the Charter that permits this doubt but the almost unlimited discretion given the Security Council. A careful examination of the principal provisions of the Charter, and in particular those provisions directly dealing with enforcement action, shows that the Security Council is not necessarily bound to act in accordance with international law.[28]

[28] On this point see, for example, J. L. Brierly, ' The Covenant and the Charter ', *British Yearbook of International Law*, XXIII (1946), pp. 83–94; Hans Kelsen, ' Sanctions in International Law under the Charter of the United Nations ', *Iowa Law Review*, 31 (1946), pp. 499–543.

The Security Council has only to decide upon the existence of a 'threat to the peace' or a 'breach of the peace' before taking enforcement action (Article 39). Neither of these two conditions are defined in the Charter. The Council is obliged by Article 24, paragraph 2, of the Charter to act in accordance with the purposes and principles of the United Nations, but the purposes of the Charter require the Security Council to act 'in conformity with the principles of justice and international law'. The wording of Article 1 appears to assume that decisions taken by the Security Council will be based both on justice as well as on international law. But justice need not be identical with the law, and should the Security Council come to this conclusion in a given instance it will be forced to choose between the two. There is nothing to prevent the application of principles of justice, that is what the Security Council considers to be justice, in the event the latter conflicts with the law.[29] The Charter prohibits the members from the 'threat or use of force' in their international relations, but it allows the Security Council to take enforcement action if it decides upon the existence 'of a threat to the peace, or breach of the peace'. The two provisions obviously can be interpreted to mean different things. Again, this will depend upon the Security Council.

To say that all this constitutes an attempt to interpret the Charter in a manner the framers did not intend to convey, that the framers, although giving the Security Council a great deal of power, intended that they use this power within the boundaries of existing law, is evidently not true. For it is a well-known fact, which may readily be found from almost any authoritative interpretation of the Charter, that an underlying political idea supported by those Powers chiefly instrumental in creating the Charter was the conferring of unlimited discretion upon the Security Council; and this political idea was clearly realised in the Charter's provisions. Professor H. A. Smith has perhaps exaggerated but there is nevertheless much truth in his statement that the Security Council represents the 'Apotheosis of power' and that 'If the Council decided that Utopia must surrender the whole or part of her territory to Arcadia, the decision is not only

[29] And Kelsen has observed that even this restriction to act in conformity with the principles of justice and international law 'applies, according to the wording of Article 1, only to actions of the Organisation which aim at the adjustment or settlement of international disputes or situations which might lead to a breach of the peace, and not to enforcement actions for the maintenance or restoration of international peace and security'. 'Collective Security and Collective Self Defence Under the Charter of the United Nations', *American Journal of International Law*, 42 (1948), p. 789.

binding upon the parties but all the Members of the United Nations are pledged to assist in carrying it into effect '.[30]

The possibility is not excluded therefore that the Security Council may, in a given instance, take measures not against the State which violates international law but, on the contrary, against a State acting in accordance with the law. Against this it may be argued that according to the law of the Charter a State violates its obligations once the Council has decided that its actions constitute a threat to, or breach of, the peace. It would follow that although the decisions of the Council may not be in conformity with then established international law, in making its decisions the Council has created new law.[31] This argument is certainly possible but obviously is not a very desirable one—either politically or legally.

There are other difficulties. The Charter while obligating members to refrain from acts of self-help has not provided the one alternative to self-help; that all disputes will be settled by compulsory adjudication and properly enforced. The Security Council itself has only the power of recommendation in settling disputes unless it acts under Chapter VII and decides a dispute to be a threat to the peace. But here the veto applies even when a permanent member is a party to a dispute. The decisions rendered by the International Court of Justice may be questioned by the Security Council. There is no guarantee they will be enforced. In fact a member if dissatisfied with a decision of the Court can take his dispute to the Council. The voting provision of the Charter may render the decisions of the Court worthless as far as their enforcement is concerned. And this applies not only to permanent members of the Council, but to any State friendly with a permanent member. But the State in whose favour the judicial decision has been made cannot take any action against the delinquent. It is not only prohibited from using force against the State failing to comply with its international obligations, it may not even threaten the delinquent State with force—according to Article 2, paragraph 4.

[30] *The Crisis in the Law of Nations* (London, 1947), p. 90.

[31] An important question in connection with the above point is whether the Charter of the United Nations may be considered as general international law. The intention to raise the law of the Charter to the status of general international law can be seen in Article 2, paragraph 6, which obligates non-member States to act in accordance with the ' Principles (of the United Nations) so far as may be necessary for the maintenance of international peace and security '. If the law of the Charter is considered as general international law then decisions of the Security Council create new international law binding upon members and non-members alike. But this interpretation of the law of the Charter is quite doubtful. If the other interpretation is accepted—that the Charter does not constitute general international law—then decisions of the Security Council create new law only for members of the United Nations.

The Charter has provided for a system in which the Security Council, primarily a political organ, possesses the power of 'judicial review' over all disputes, including those settled by the International Court of Justice. Since the Council does not operate on the principle of a simple majority but on the principle of a qualified majority requiring the unanimity of the five privileged Powers, it is doubtful whether it will often, if ever, successfully exercise this power. The Covenant with all its defects avoided this sort of thing.

The centralisation provided for in the Charter may well have the unexpected effect of allowing States the opportunity to avoid their international obligations. The Charter serves as a striking illustration of an important point: centralisation is desirable only if effective, and it is effective only if there is a reasonable guarantee that enforcement action will be taken against all, not certain, violations of the law.

Last of all are those provisions, yet to be carried out, which would place armed forces at the disposal of the Security Council for future enforcement action. It is hardly hazardous to surmise that they will not be fulfilled. More significant here are the original ideas that were entertained concerning the desirable strength of such forces. It seems that it was never the intention of the Great Powers to create an international force competent to deal with a serious threat to, or breach of, the peace.[32] But if the intention was to create a security system under which it is next to impossible to take enforcement action against one of the five permanent members of the Security Council against whom was it intended that action be taken? There are, of course, the enemy Powers of World War II. The Charter provides, however, a much easier procedure for enforcement measures taken against the latter, a procedure which may avoid altogether the provisions of Chapter VII. Under Article 107 of the Charter enforcement action against all former enemy States can be taken at will by any member of the United Nations if it has been at war with these States. Action taken under Article 107 may, but need not, be of the nature of a reaction against a violation of international law since the Article speaks only of 'action . . . taken or authorised as a result of that war by the Governments having responsibility for such action'.

Only the small Powers remain as probable objects of enforcement

[32] For an indication of this attitude see the testimony of the United States delegate to the San Francisco Conference before the Senate Foreign Relations Committee. *Hearings Before the Committee on Foreign Relations, United States Senate, 79th Congress., 1st Session, on the Charter of the United Nations* (Washington, 1945), pp. 653–4.

action to be taken according to the regular procedure set down in the Charter. But an international organisation limited to the taking of enforcement actions against only the small Powers is hardly a sufficient guarantee for the future maintenance of international peace and security.

Thus the centralisation achieved under the Charter is, in view of the foregoing analysis, a questionable achievement. The Charter has not guaranteed the compulsory adjudication of all disputes. It has not even guaranteed that those disputes which may be resolved by judicial settlement will be enforced. The Security Council constitutes the 'Court' of last resort and there is no assurance that the decisions of a political organ will necessarily be made on the basis of existing law. Most important is the fact that the enforcement actions taken by the Security Council need not be reactions against a State violating established law, hence their character as sanctions may be doubted.

One can hardly avoid the conclusion that in many important respects the Charter resembles a political alliance rather than the constitution of an international community, and that the primary aim seems to have been the establishment of a security system designed to serve rather limited purposes. The Charter is as Professor Brierly has suggested 'a highly specialised instrument' intended, at best, only for the taking of enforcement actions against certain violations of the law performed by certain States.[33] The fundamental principle of the Charter is not that the law shall be enforced in every instance, but rather that the political unanimity of the five permanent members of the Security Council shall be required as the necessary condition for any enforcement action.

The breakdown of this political unanimity has shifted the emphasis from Article 39 to Article 51 of the Charter, a shift which represents little save the abandonment of an unworkable centralised

[33] Professor Brierly's conclusion on these aspects of the Charter is well worth noting. 'It seems probable that the explanation must be sought in the circumstances in which the Charter was originally drafted. It was drafted at Dumbarton Oaks in the autumn of 1944, when the issue of the war was still uncertain, and, to outward appearances at least, Germany and Japan still seemed immensely strong. It sought to forge a weapon which could be used against just such a danger as then existed, a security system of irresistible power and ready for immediate action. But the weapon that was fashioned has turned out to be a highly specialised instrument, useful only if history should ever repeat itself, against a particular danger for which we no longer need it, and only on the assumption that the wartime unity of the Great Powers would be a permanent factor in their relations. Instead of a system that ensures "prompt and effective action" we have one that can be jammed by the opposition of a single Great Power. We have discarded the system of the Covenant which, though not certainly, might have worked, and we have substituted for it one which hardly even professes to be workable . . . .' *The Law of Nations* (4th ed., Oxford, 1949), pp. 282–3.

system of collective security for one which is decentralised. Article 51 reads as follows :

> ' Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

Article 51 was not inserted in the Charter in order to provide a ready alternative to the collective enforcement actions provided under Articles 39, 41, 42. Its insertion was by way of an exception. The right of self-help is in principle forbidden under the Charter; Article 51 constitutes the only limited exception to this general prohibition (excluding Articles 53 and 107). The use of force as an instrument of self-help is permitted only as a reaction against an illegal use of force, that is as an act of self-defence. The thought behind Article 51 was simply that a State should have the right to defend itself during that brief period which would elapse between the outbreak of armed force and the time the Security Council would be able to take that action necessary to restore international peace and security.

The right of self-defence is both restricted and extended in Article 51. It is restricted in that it may be exercised only in the event of an ' armed attack ', and even then only until the Security Council has taken what it considers to be necessary measures. On the other hand the right of self-defence has been extended by allowing for so-called ' collective self-defence ', the latter provision being inserted in Article 51 in order to bring certain regional arrangements into conformity with the Charter. The term ' collective self-defence ' is not very accurate for the right conferred upon members is not one of self-defence, strictly speaking, but the right to go to the assistance of a State acting in self-defence. The right of collective self-defence is the authorisation that States may act collectively against an armed attack until such time as the Security Council has taken appropriate action. Members of the United Nations may therefore conclude regional arrangements which have as a purpose the organisation of collective self-defence. This is the principal purpose of such recently concluded regional arrangements

as the Inter-American Treaty of Reciprocal Assistance, the Brussels Alliance, and the North Atlantic Pact.[34]

As long as there was a reasonable guarantee that the Security Council would be able to function in the event of a threat to the peace or a breach of the peace the exact interpretation that was to be placed on Article 51 was not of decisive importance. Whether a State had acted in self-defence against an armed attack would be decided by the Security Council or, more clearly perhaps, the Security Council would always be able to review alleged instances of self-defence. Thus the chief obstacle to the consideration of self-defence as a truly juridical institution would be removed. It will be recalled that the impossibility of such review with respect to the Kellogg–Briand Pact furnished the basis for strong objection made against the consideration that measures of self-defence allowed by the Pact could properly be considered as sanctions.

In the all too likely event that the Security Council will not be able to function as an organ of review the same objections made against the Kellogg–Briand Pact may be made, with almost equal force, against measures of individual and collective self-defence taken under Article 51. It is true that Article 51 has limited the right of self-defence to the case of ' armed attack '. But what constitutes an armed attack is not at all self-evident. The word ' attack ' as Professor Kunz points out ' is a strategic, not a legal word. It is clear that " armed attack " can only mean an illegal armed attack, an " aggression ". But the problem of the definition of aggression has not only not yet been solved : the very desirability of the definition of aggression has been rejected by Pan-America

[34] It will be noted that the North Atlantic Pact is referred to above as a regional arrangement. It is believed that this is the proper interpretation of the Pact. The United States State Department in its official explanation of the North Atlantic Pact does not directly admit it is a regional arrangement however, for it is stated: ' The Atlantic Pact is a collective self-defence arrangement among countries of the North Atlantic area . . . . It is aimed at co-ordinating the exercise of the right of self-defence specifically recognised in Article 51 of the United Nations Charter '. *The North Atlantic Pact*, Department of State Publication, 3462 (March, 1949). The implication of the State Department's White Paper, that the North Atlantic Pact is a collective self-defence arrangement concluded under Article 51 can hardly be accepted. No arrangements can be concluded ' under ' Article 51, but they may be concluded for the purpose of implementing the collective self-defence provision of Article 51. As such a regional arrangement can be a collective self-defence arrangement but it must be concluded according to those Articles of the Charter governing regional arrangements (Articles 52, 53, 54). The attempt to avoid calling the Pact a regional arrangement apparently has as its purpose the further attempt to evade these particular provisions governing regional arrangements, especially the provision of Article 54 that the Security Council ' shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security '. The members of the North Atlantic Pact evidently do not contemplate such action as is prescribed by Article 54.

and at San Francisco '.[35] And the same writer further notes that ' If " armed attack " means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident; necessity or proportionality are no conditions for the exercise of self-defence under Article 51 '.[36] The support of the Greek revolutionary forces by Albania, Bulgaria and Yugoslavia has already been considered by the United States as constituting an armed attack. Has the advent of the atomic bomb changed the interpretation to be given to the term ' armed attack '? There is influential opinion in support of the assertion that it has.[37] It is by no means difficult to think of other circumstances which might possibly be considered as falling under the term ' armed attack '.[38] One may well wonder how much more satisfactory the Charter is, as compared with the Kellogg–Briand Pact, by limiting the right of self-defence to defence against an ' armed attack ', if there is to be no competent organ to interpret this term and to possess the authority of ultimate review of instances in which this right may be exercised.

The implementation of Article 51 by the conclusion of a general protocol open to all members of the United Nations and stipulating the obligation of collective self-defence would be a clear return to the system of collective security established under the Covenant of the League. The Covenant did not by express provision establish the right of self-defence since an express provision to this effect was unnecessary. The system of decentralised sanctions provided for in Article 16 against the illegal ' resort to war ' implied the right of self-defence. The same Article (16) established the obligation for members of the collective self-defence of the State attacked. The main point is that the existence of those conditions necessitating the exercise of individual and collective self-defence are decided, according to either Article 16 of the Covenant or a general protocol implementing Article 51, by each member acting independently.

The recent pattern of regional arrangements concluded for the purpose of organising collective self-defence must be placed somewhere between the implementation of Article 51 by a universal

[35] ' Individual and Collective Self Defence in Article 51 of the Charter of the United Nations ', *American Journal of International Law*, 41 (1947), p. 878.

[36] Kunz, *loc. cit.*

[37] Cf. *The International Control of Atomic Energy—Growth of a Policy* (Department of State Publication 2702, 1946), in which it is stated : ' It is . . . clear that an armed attack is now something entirely different from what it was prior to the discovery of atomic weapons ', p. 164.

[38] Cf. Secretary of State Dean Acheson's press conference on the North Atlantic Pact. *The New York Times*, March 19, 1949. On this question as to just what constitutes an armed attack the Secretary of State was indirectly quoted as replying : ' Neither under the United Nations Charter nor under this (*i.e.*, the North Atlantic Pact) was there any specific definition, and he thought there should not be. When you come to real situations you ought to be able to have some latitude in deciding them '.

protocol and no implementation at all. For the members of such regional arrangements the right of 'collective self-defence' has been transformed into a duty. It is possible that a regional arrangement will confer upon a central organ the authority to take the decision required for the application of Article 51. But this decision is then binding only upon the members of the regional arrangement. A quite different decision may be reached by the members of another regional arrangement concluded under Chapter VIII of the Charter and organised for the purpose of providing collective self-defence.[39] Both sides will claim they are waging a war of self-defence and with the paralysis of the Security Council there will be no competent authority to decide this question.

In conclusion the following observations may be made.

The problem of the legal interpretation of war is no longer to be considered as distinct from the problem of the legal interpretation of acts of force falling short of war.[40] The Charter of the United Nations has prohibited the use of force; whether force takes the form of war or not is of no importance.

War can no longer be regarded as legally admissible when taken as a reaction against any violation of international law. The Pact of Paris and the Charter of the United Nations make this point abundantly clear. The use of force as an instrument of legal self-help has been restricted under the United Nations Charter to the special case of self-defence, to be exercised only against an 'armed attack'. At the same time the right of self-defence has been extended by allowing other States to 'collectively' assist in the defence of the attacked State.

Whether the use of force may now be described in a given instance as either an international delinquency or an international sanction depends not so much on the possibilities afforded by a carefully circumscribed 'objective' definition of 'armed attack', but rather on the possibility that alleged acts of self-defence will be subject to final review by the Security Council. Since this possibility appears exceedingly remote we are faced with the same

[39] The most important regional arrangement concluded to date, the North Atlantic Pact, does not confer this authority to decide when an armed attack occurs upon a central organ. Under Article 5 of the North Atlantic Pact the decision is left to each member. Article 5: 'The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the party or parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area'.

[40] More strictly, the above statement is correct only if the Charter is considered as general international law. I do not think this point need be pressed however.

principal objection raised against the Kellogg-Briand Pact and the Covenant of the League. The limitation of the right of self-defence in the Charter to cases of 'armed attack' has not solved this fundamental problem.

Nor is it certain that a future aggressor will be dealt with successfully. Article 51 of the Charter stipulates only a right not a duty of self-defence. This right may, and has been, transformed into a duty in certain regional arrangements. But even in the latter the decision as to whether an armed attack has occurred may be left to the individual members of the arrangement. A regional agreement may also leave members free to provide only that degree of assistance for the attacked State they may think is necessary. The most important regional arrangement to date, the Atlantic Pact, appears to follow along these lines.

In short, the basic objections put forward against the possibility of interpreting war as either a sanction or a delict still stand.

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ADDENDUM [1]

With the realisation that the somewhat fortuitous circumstances which allowed the Security Council to take effective action in the Korean question might not recur in the future, the Fifth Session of the General Assembly adopted on November 3, 1950, a resolution entitled 'Uniting for Peace'.[2] The heart of this resolution is to be found in two operating paragraphs which read in part as follows:—

> 'The General Assembly, ...
>
> '1. *Resolves* that if the Security Council because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately

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[1] The following brief comment on the General Assembly Resolution 'Uniting For Peace' passed during the Fifth Session of the Assembly was written shortly after its passage. Heavy reliance was necessarily placed on the texts, and partial texts, of speeches reported in the *New York Times*. The principal issues raised by this resolution, especially in connection with the problem of the present status of war in international law, may however, be summarised.

[2] For text of Resolution see *New York Times*, November 4, 1950, p. 4.

with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or acts of aggression the use of armed force when necessary, to maintain or restore international peace and security. . . .

'8. Recommends to the Members of the United Nations that each Member maintain within its national armed forces elements so trained, organised, and equipped that they could promptly be made available, in accordance with their respective constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognised in Article 51 of the Charter'.

The resolution has the specific character of a recommendation; as such it has, at least for the present, a political rather than a legal character. Recommendations of the Assembly, especially when made under Article 10, do not at present constitute legal obligations for the Members.[3] Members are free to accept or reject the recommendations of the Assembly especially as to the existence of a threat to the peace or breach of the peace. Similarly Members are left free to take, or to refuse to take, enforcement action in accordance with Assembly recommendation.[4]

Is the resolution in conformity with existing Charter provisions? Supporters of the resolution base their legal argument chiefly upon the power given to the General Assembly, especially under Article 10 of the Charter, to discuss and make recommendations to the Members or to the Security Council with respect to 'any questions or matters within the scope of the present Charter', subject only to the restriction of Article 12, paragraph 1.[5]

[3] The phrase 'at present' is deliberately emphasised. Since the Resolution is in substance an attempt to revise the Charter without going through the formal procedure provided for amendments it is not impossible that in the future the Assembly may decide that the failure to carry out its recommendations constitutes a breach of the peace and accordingly recommend enforcement action against the state(s) in question. This would constitute in fact a far-reaching revision of the Charter, but such revision is not inconceivable.

[4] This point was emphasised by the United States Delegate, Mr. John Foster Dulles, in his speech before the Assembly's Political and Security Committee, cf. *New York Times*, October 10, 1950, p. 10. It is interesting to note, however, that there is no attempt to define in the Assembly Resolution what constitutes either a threat to the peace or a breach of the peace. In this particular respect the same objections made to Article 39 of the Charter may be made to paragraph 1 of the Assembly Resolution.

[5] Article 12, paragraph 1 reads: 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'.

Since the provisions of the resolution have only the character of recommendations no question of a violation of the Charter is said to arise.

It would seem that if the resolution has any basis in the Charter such a basis must be found in Article 10 and not Articles 11 or 14.[6] Article 11, paragraph 2 expressly stipulates that 'any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion'.[7] The interpretation that the provision of Article 11, paragraph 2 constitutes a restriction on the Assembly's power of recommendation under Article 10 is possible but not necessary. In fact, since Article 10 contains no reference to Article 11, paragraph 2, and Article 11, paragraph 4 stipulates that the powers of the General Assembly set forth in Article 11 'shall not limit the general scope of Article 10', the opposite interpretation—that Article 11, paragraph 2, is no restriction on Article 10—is perhaps more feasible.[8] And Article 14 of the Charter grants the Assembly power to recommend only 'the peaceful adjustment of any situation, regardless of origin'. Clearly Article 14 does not grant the Assembly competence to make the kind of recommendations envisaged in the Assembly Resolution.

Has the resolution any basis in Article 10 of the Charter? It is difficult to give any but a negative answer to this question. The

[6] The American representative argued in this connection: 'The same instrument which placed on the Security Council the "primary" responsibility for the maintenance of international peace and security, the same instrument which authorised the veto in the Security Council, also by Articles 10, 11 and 14, gave the General Assembly power to recommend as to matters that might be vetoed'. *New York Times*, October 10, 1950, p. 10.

[7] It is possible, however, to interpret the term 'action' in Article 11, paragraph 2, to mean only enforcement action taken by the Security Council under Chapter VII of the Charter. This would then mean that the Assembly must refer a question to the Security Council only if the former body considers it necessary for the Security Council to take action under Chapter VII. Accordingly this restriction would not apply if the General Assembly thought it necessary that another type of action, specifically the use of armed force recommended by the General Assembly, should be taken. This interpretation of Article 11, paragraph 2 was in fact given by the Canadian delegate during the debate on the Resolution.

[8] The Soviet Foreign Minister relied heavily on Article 11, paragraph 2 to establish the illegality of the Resolution. Before the Political and Security Committee Mr. Vishinsky stated: 'You say that the General Assembly has the right to recommend anything it wishes. I beg to differ; it can recommend everything except that which it is stated it cannot do in Article 11'. *New York Times*, October 11, 1950, p. 12. Interestingly enough the Soviet Foreign Minister, according to his own statements, claimed support for his interpretation of Article 11, paragraph 2 by pointing to the interpretation given this same provision by Professor Hans Kelsen in his recent work, *The Law of the United Nations* (New York; Frederick A. Praeger Inc., 1950), pp. 200–207. But Kelsen expressly states that although the interpretation that Article 11, paragraph 2, restricts Article 10 is not excluded, the opposite interpretation is not only possible but indeed more plausible.

obvious objection is that recommendations to take enforcement measures are only possible after the determination of the existence of a threat to, or breach of, the peace. But this latter determination may only be made, according to the Charter's provisions (Art. 39), by the Security Council, not the General Assembly. Yet if the General Assembly is not competent to determine the existence of a threat to, or breach of, the peace, how can it possibly recommend to Members that enforcement measures are necessary? The answer would appear that the Assembly can do neither.

Against this interpretation it may be said that *if* it is assumed that the General Assembly has the power to recommend the use of armed force (under Article 10) it has the power to make such recommendations whenever it deems them appropriate. Therefore no previous determination of the existence of a breach of the peace is necessary because, in contradistinction to Article 39, Article 10 does not restrict the power of the General Assembly to make recommendations by stipulating a condition analagous to that provided for in Article 39. The result is that the General Assembly may, under Article 10, recommend to Members the use of armed force without having determined the existence of a threat to, or breach of, the peace. To refute this contention—that the General Assembly may recommend the use of armed force—it has been maintained that Article 24 of the Charter confers 'primary responsibility for the maintenance of international peace and security' on the Security Council, and that this power is exclusive. Still, the interpretation is possible that the 'primary responsibility' conferred on the Security Council does not necessarily exclude a secondary responsibility of the General Assembly; at least this exclusion cannot be maintained on the basis of a literal interpretation of Article 24.

But this latter possibility does not appear to have been utilised in the Assembly Resolution; for paragraph 1 of the resolution does not speak simply of recommendations for enforcement action but, instead, that collective measures including the use of armed force may be recommended by the Assembly 'in case of a breach of the peace or act of aggression'. It is of great importance to bear in mind that paragraph 1 specifically limits recommendations for the use of armed force to breaches of the peace or acts of aggression but not to threats to the peace. And it is just this last limitation which serves to emphasise that the resolution seems to assume that the Assembly can determine the existence of a threat to, or breach of, the peace and especially to distinguish between the two conditions

as a prior step for the making of proper recommendations. This assumption though has no foundation in the written Charter.

Also questionable is Article 8 which speaks of forces 'made available . . . for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly'. It is certainly possible for Members to place national elements of their armed forces at the disposal of the United Nations on recommendation of the Security Council even without prior agreement under Article 43. These national forces are then United Nations units acting under the direction, or command, of the Council. The United Nations units, or forces, in Korea may be viewed in this light. To speak of a 'United Nations unit' is to refer to a force that is in some way acting under the actual direction or command of an organ of the United Nations. But the armed forces of states acting in accordance with a General Assembly resolution can hardly be considered as United Nations units. According to the provisions of the Charter at least the General Assembly is not competent to direct or command armed forces. Such competence is reserved exclusively to the Security Council.[9]

It is, in fact, extremely difficult to attempt to square the Assembly resolution with the existing provisions of the Charter. Members in defending the resolution concentrated less on 'legalistic' questions and more on demonstrating the compatibility of the resolution with the 'spirit' of the Charter. The real spirit of the Charter was said to be the guarantee of 'effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression'. Unfortunately this latter goal is to be realised according to the Charter only by action of the Security Council on the basis of the unanimity of the five permanent members. Thus there were originally two 'spirits' of the Charter which have subsequently proven mutually incompatible. There is in fact a touch of the ironic in the present attempts to renounce an arrangement loudly proclaimed in 1945 as the only 'realistic' approach to the problem of peace. The

[9] Article 51 of the Charter may be mentioned in this connection. Members do have the right to take measures of 'collective self-defence' should an armed attack occur and the Security Council be unable to act. It may be argued that in the event of an armed attack against a Member of the United Nations, other Members coming to the collective defence of the latter act under Article 51 and merely make use of an Assembly recommendation as an indication of the existence of an armed attack and a suggestion as to what further action to take. But it is hardly possible to speak of action under Article 51 as United Nations action and the forces acting as United Nations units. This is possible only after the Security Council has been able to take appropriate action. Besides, Article 51 speaks of collective self-defence in case of an 'armed attack' whereas paragraph 1 of the Assembly Resolution speaks of the 'use of armed force' in case of a 'breach of the peace or act of aggression'.

United States representative stated before the Assembly's Political and Security Committee that his government believed that the Assembly would reflect ' better than any other body, the supremacy of " law ", which in essence is the consensus of world opinion as to what is right '.[10] This profession of democracy however stands in marked contrast with the written Charter, which provides not for democracy but for the autocracy of the privileged five. The idea that law is in essence the consensus of world opinion as reflected by the Assembly may indeed be desirable. But it has no basis in the written Charter.

R. W. T.

[10] *New York Times*, October 10, 1950, p. 10. Mr. Dulles also stated that the United Nations Delegation ' does not accept the view that " responsibility " is a monopoly of the few and of the great '. Yet it is just this view that formed the basis of the Charter.

NATIONALITY AND DOMICILE IN SWEDISH PRIVATE INTERNATIONAL LAW

In international relations various points of contact are decisive factors in the choice whether the law of your own country or that of another should prevail. A person's connection with a certain State is a matter of great importance as private international law is still based on the principle, laid down by the post-glossators in the late Middle Ages, that metaphorically speaking certain rules adhere to the person wherever he goes. The legal rules thus characterised are usually comprised under the name of the personal law. There is no agreement upon the scope of the personal law, but it is generally taken to include the status of a person and his capacity, marriage, divorce, the relationship between parents and children, and succession to movables upon death.[1]

In determining the personal law itself, the choice has lain between two principles, that of nationality and that of domicile. According to the former, the personal law is the law operative in the individual's native country as determined by his citizenship, according to the latter it is the law of the State in which the individual has his domicile. It should be stressed that a person's domicile is not identical with his residence. The concept of domicile varies from one country to another. It is, however, always essential that the person concerned has intended to stay either for a considerable time or for an indefinite period. The legislation may also stipulate that his residence must have had a certain duration.[2] The principle of nationality has conquered the European continent, that of domicile prevails in the Anglo-Saxon world. The Scandinavian countries are divided into two groups. In Denmark and Norway, private international law is based on the principle of domicile. Sweden, on the other hand, has adopted the principle of nationality. The same is true of Finland.

During the last two decades, Swedish private international law has undergone important changes. In amendments of Swedish statutes solutions based on the principle of domicile have been given preference. The same trend is to be found in Swedish case law. The principle of nationality is still the main

1 Cf. Rabel, *The Conflict of Laws*, I. 1945, p. 102.
2 Cf. Rabel, *op. cit.* pp. 139 ff.

factor, but its position has been undermined. The purpose of the present article is to describe the Swedish law on this matter and its general historical background, and finally to consider whether the principle of domicile or of nationality is most suited to a country like Sweden.

If early tribal customs are disregarded,[3] it is clear that the principle of domicile prevailed for many centuries in all countries which developed systems of private international law.

The decline of domicile was the result of the strong national movements of the nineteenth century. The French Code civil of 1804 is usually cited as being the oldest code founded on the principle of nationality. Section 3 (3) is said to prescribe that the status and capacity of a Frenchman must be determined according to French law even though he may be domiciled abroad ('les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger'). Although it has been queried whether the legislator of the French Revolution really intended to abandon the principle of domicile, it was not long before this interpretation was generally adopted in French jurisprudence.[4] It also gained support in later French statutes. The fourth paragraph of Österreichisches Bürgerliches Gesetzbuch of 1811, which related to the legal capacity of Austrian citizens, formed a parallel to the above section of the Code civil. Though doubts were at first expressed, it came to be regarded as a manifestation of the principle of nationality.[5] The principle of nationality also gained ground in those countries where the French Code civil was adopted or whose legislation was influenced by this code.

The principle of nationality was first advanced as a clearly defined programme by the Italian Mancini. In his inaugural address as professor of international law at the University of Turin on January 22, 1851, he chose as his theme : Della nazionalità come

[3] According to Teutonic law, private law was the law of the tribe.

[4] According to Niboyet, the authors of the Code civil probably did not mean to break with the principle of domicile. They were aware of the distinction between 'le domicile et la résidence'. Section 3 (3) merely stated that a Frenchman should be subject to French law even though he had taken up his *residence* abroad. It was postulated that he had still the intention of returning and thus had his domicile in France. Niboyet adds that according to accepted law a Frenchman at that time lost his citizenship when he had no longer the intention of returning. Since 1889, however, the circumstance that a person establishes his home abroad no longer results in the loss of his citizenship. See Niboyet, *Cours de droit international privé*, 1947, pp. 386 ff. See especially p. 397. Cf. Niboyet, *Traité de droit international privé français*, III, 1944, p. 119.

[5] Cf. Walker, *Internationales Privatrecht*, 2 Aufl., 1922, pp. 72 ff.—Savigny, on the other hand, was of opinion that the Austrian Code adhered to the domicile principle. See Savigny, *System des heutigen Römischen Rechts*, Bd. VIII, 1849, pp. 114 ff.

fondamento del diritto delle genti.[6] In order to understand his theories it is necessary to appreciate the political situation of Italy in the middle of the nineteenth century. A great part of the country was held by Austria, another was under French influence. National groups had unsuccessfully rebelled. Mancini, himself a political refugee from another part of the country, formed his address as an attack on the foreign invaders. Mancini stressed that every nation had the right to unite and to govern itself. The nation was the natural society of men from the same territory, of the same origin, with the same customs, speaking the same tongue, and thus constituting a community of life and ideas. To guard and to cultivate his nationality is not only the right but also the duty of a human being.[7] Mancini further displayed how nationality was the basis of the law.

Mancini later developed the implications of his theory in the field of private international law when he took part in the drafting of the Italian civil code, which was enacted in 1865. His doctrine was explained in full in a report presented to the Hague Conference arranged by the *Institut de droit international* in 1874.[8] Private law was built upon individual autonomy. The claim of an individual that his rights should be respected was as valid against a foreign sovereign as against his own State.[9] Nationality was thus to determine the sphere in which the law of that State was to prevail. The national law was an integral part of the individual. He could not on this point renounce the connection with the law of his native country.[10] At the bottom of Mancini's

[6] Mancini's paper was printed in *Diritto internazionale*, Naples, 1873, pp. 1–64.

[7] 'Le cose dette fin qui mostrano ormai a discoperto in che consista una NAZIONALITÀ, e quali ne siano gli elementi costitutivi, e ci porgono ragione di riconoscere in essa una *società naturale di uomini da unità di territorio, di origine, di costumi e di lingua conformati a communanza di vita e di coscienza sociale*. Donde nulla riesce più agevole che dimostrarne la legittimità, e come la conservazione e lo sviluppamento della nazionalità addivenga per gli uomini non solamente un *diritta*, ma un *dovere giuridico*.' Mancini, *op. cit.*, p. 37.

[8] Mancini's report was published in *Revue de droit international et de législation comparée*, VII, 1875, pp. 329 ff.

[9] In Mancini's opinion, private law is based on 'l'autonomie individuelle et réciproque, autonomie légitime et inviolable. Et comme le droit de nationalité, qui appartient au peuple entier, n'est pas différent en substance du droit de liberté qui appartient aux individus, il s'ensuit que l'individu peut réclamer, au nom du principe de nationalité, des Etats et des nations étrangères, le même respect pour les droits privés qui forment son patrimoine, que celui qu'il réclame de son Etat à lui et de ses concitoyens. Cette garantie et ce respect sont donc un acte de stricte justice : ils sont, nous l'avons déjà dit, un devoir inviolable. Ce devoir résulte d'un principe plus élevé que ne le sont la courtoisie ou la bienveillance mutuelle des Etats, ou l'utilité et les intérêts d'une nation, bien que cette utilité et cet intérêt jaillissent de l'observation rigoureuse de ces devoirs'. (*Revue de droit international et de législation comparée*,, VII, 1875, p. 351.)

[10] 'Personne ne peut renoncer à l'état et aux rapports de famille qui lui sont attribués par la loi de sa patrie.' See *op. cit.* (above), p. 351.

theory are the liberal ideas of freedom. It is a characteristic feature of his views that he should emphasise the primary duty of the nation to continue to impose its legal system on all citizens, whatever their residence, simultaneously with his stressing the duty incumbent on every nation of respecting the laws of other nations. In spite of its nationalistic stamp, the principle of nationality as understood by Mancini thus contains a feature of internationalism.

The principle of nationality met with very great success. In so far as private international law was codified, this principle was generally adopted on the European continent. The development in Germany may be cited as an example. While Preussisches Landrecht of 1794, like ' gemeines Recht ', was based upon domicile, the legislation which came into existence after the middle of the nineteenth century adopted the test of nationality. This was the case with the Saxon civil code of 1863. The uniform legislation dealing with bills of exchange and copyright was based on the same test. Nationality won its final victory in Bürgerliches Gesetzbuch of 1896.[11] Further, nationality was made the basis of the international conventions on conflict rules of matrimonial law and laws regulating guardianship which resulted from the conferences held at The Hague in 1893, 1894, 1900, and 1904.[12]

The success of the nationalists is accounted for by various factors. It has been said, for instance, that the nationality of a person is more unlikely to be disputed than his domicile. Also, that the investigation of the resident's intention, which figures so largely in an inquiry into domicile, introduces an element of uncertainty that is absent in the ascertainment of nationality.[13] The emotional aspects seem, however, to have been decisive. The principle of nationality was in keeping with the political movements of a period when Italy and Germany accomplished national unification.[14] This may be clearly demonstrated by the views of Gebhardt, in the

[11] The German rules of private international law occur in Einführungsgesetz, Art. 7–31.

[12] The proceedings of the Hague Conferences show that the leading delegates regarded it as a matter of course that the Conventions should be founded on the principle of nationality. In the memorandum, appended to the invitation emitted by the Dutch Government to the first Conference of 1893, reference was made to preparatory work done by Mancini which had been presented in a memorandum from the Italian Government of 1881. At these Conferences there was no discussion of the pros and cons of each principle, in spite of the fact that even at the first Conference a reservation was made by the Danish delegate and, at the subsequent one, by the Norwegian representative. Norway was represented for the first time at the second Hague Conference of 1894.

[13] The legal-technical viewpoint is especially stressed by L. v. Bar. See his work *Theorie und Praxis des internationalen Privatrechts*, 2 Aufl., 1889, especially pp. 271 ff.

[14] Cf. Batiffol, *Traité élémentaire de droit international privé*, 1949, pp. 252 ff.

report in which he presented his draft of the German rules contained in the Einführungsgesetz.[15] According to him, personal status was an indivisible whole incapable of being split up into parts, some subject to this law, some to another. The personal law did not depend on a person's home or centre of business activities in a certain country, but the basis was ' die durch Abstammung begründete Volksindividualität '. The dignity of the German Empire and its political interests presupposed that a German should be subject to German law wherever he had his domicile.

It was probably for other reasons that most of the small States of Europe adopted the principle of nationality. One may observe that Sweden and most of the other small States were emigration countries and that it was considered desirable to maintain relations between the emigrants and their native country. Nor should we overlook the doctrine of public international law, according to which it is the duty of every State to respect the law and national character of foreign countries. The principle of nationality consequently implied a promise that the great powers should respect also the law of the small States. Finally, the strong liberal element of Mancini's theory should also be mentioned : it emphasised the freedom of the individual and stressed the connection of the law with the individual.

The development in Sweden reflects events on the European continent. Originally this country, too, followed the principle of domicile, in so far as it is possible to talk of private international law in connection with the old Swedish law.[16, 17] Gradually there was a change. When the question of the validity of marriages contracted abroad was discussed at the eighth Scandinavian Lawyers' Conference of 1896, the Swedish members held that the principle of nationality should govern the legislation to be framed on the subject.[18] In his Handbook of Swedish Private International Law of 1907, Reuterskiöld points out that Swedish law had accepted the view that a person's status was tested by his nationality.[19] In fact, Sweden, by a statute passed in 1904, adopted without

[15] Gebhardt's report was published by Niemeyer in 1915 in the series Veröffentlichungen des Seminars für Internationales Recht an der Universität Kiel, Heft 1 : ' Die Gebhardtschen Materialen '.

[16] The guiding principle of old Swedish law was the territorial principle. All persons resident in the country were subject to Swedish law.

[17] Cf., *e.g.*, Schrevelius, *Lärobok i Sveriges allmänna nu gällande civilrätt*, I, 1844, p. 65.

[18] *Nordiska Juristmötet*, 1896, pp. 43 ff., Judge Herslow. See also Hellner, *Om giltigheten av utomlands ingångna äktenskap*, *Nordiska Juristmötet*, 1896, app. II, pp. 22 ff.

[19] Reuterskiöld, *Handbok i svensk privat internationell rätt*, 1907, p. 79.

reserve the Hague Convention, based on the law of nationality and designed to settle conflicts of laws with regard to the conclusion of marriage, divorce, judicial separation, and guardianship.[20] A later statute of 1912 adopted the convention dealing with the effects of marriages. The Act of 1904 goes further than is required by the Hague Conventions concerned. The Act is applicable in relation to foreign countries generally. The Act of 1912, on the other hand, formally applies only in relation to those States which have ratified the basic conventions. Another statute of 1937, having no connection with international conventions, extends the law of nationality to another field by providing that intestate succession, whether to movables or immovables, shall be governed by the law prevailing in the State of which the deceased was a citizen at his death.

During the last few decades, nationality has had to give way, on one point after another, to domicile. One might almost talk of a return to the older system of law. By adopting the principle of nationality Sweden diverged from Denmark and Norway, whose legal systems continued to rest on the principle of domicile. This difference was held to be an inconvenience. True, thanks to Scandinavian co-operation, considerable uniformity had been achieved with regard to the civil law statutes on marriage, guardianship, and succession upon death, but the uniformity was not complete. On certain points, important differences still existed. It therefore came to pass that a judicial decision might vary with the forum.

By a Convention of 1931, however, common rules of private international law were created for all the Scandinavian countries. The Convention, which related to marriage, adoption, and guardianship, was signed not only by Sweden, Denmark and Norway, but also by Finland and Iceland. According to this Convention, all Scandinavia is to be regarded as 'a unity, in which the private citizen appears before the court of the country where he is domiciled, and in which he is tried in accordance with the law operative in that country'.[21] For some cases the Convention states with more precision the conditions that are essential to the acquisition of such a domicile. Thus the right to contract marriage

[20] In the Act governing certain international relations concerning marriage and guardianship, 1904, fresh chapters have been inserted, in 1924, when Sweden became a party to the Convention on conflict rules concerning interdiction of incapable persons, and in 1949, when at the introduction of the Parents and Children Act certain conflict rules concerning adoption were transferred to this Act. Since 1949 the Act is called an Act governing certain international relations concerning marriage, adoption, guardianship, and similar matters.

[21] The *Swedish Law-Drafting Board*: *Report* concerning certain international legal relations, I, His Majesty's Stationery Office, 1929: 12 (Lagberedningens förslag angående vissa internationella rättsförhållanden I, SOU, 1929: 12) pp. 115 ff.

is only tested by the law of the country of domicile if the person concerned has been resident there for at least two years (art. 1). The text of the Convention was adopted by a Swedish statute passed in 1931. The Acts of 1904 and 1912, which were based on the Hague Conventions, still remain in force. In the Act of 1904 it was ordained, however, that His Majesty the King was free, upon agreement with the other Scandinavian countries, to prescribe certain deviations from the regulations stated in that Act. In the result, there are now two sets of rules in the field of private international law, one based upon the principle of domicile as applied in relation to the Scandinavian countries, another based upon the principle of nationality, applicable in relation to other countries.

A later Convention of 1934 extended the principle of domicile to succession, wills and administration, though to a certain extent, like the Convention of 1931, it made the length of the residence a relevant factor. Thus, the Swedish statute, which adopts this Convention, provides that the right of inheritance is governed by Swedish law, if estate is left in Sweden by Danish, Finnish, Icelandic or Norwegian citizens resident in this country. If the deceased, however, had not resided in Sweden for five years or more by the time of his death, his national law must be applied if this is urged by any heir or legatee whose right depends on it.

The Conventions of 1931 and 1934 represented a concession by Sweden to the domicile countries of Denmark and Norway. This concession was of course in the first place made in the interests of Scandinavian uniformity. At the same time the existence of two sets of rules, one to govern inter-Scandinavian relations, the other to govern relations with the rest of the world, was not regarded as irrational. When the bill of 1931 was submitted to the Legislative Council (a body of three Supreme Court Judges and one judge, member of the Court of Administrative Law), the Council stated that a departure from the principle of nationality was quite justifiable in relation to the other Scandinavian countries. 'Even if the principle of nationality seems more rational in the relation between citizens of states totally dissimilar in matters of law and civilization, this was not the case with regard to the relationship between kindred peoples adhering to similar standards of law. The more the states have approached one another in legal affairs, the less are there any grounds for testing the legal status of a foreigner by his national law'.[22]

[22] A similar line of thought can also be traced in the scheme proposed by the *Law-Drafting Board* (His Majesty's Stationery Office, 1929 : 12 (Lagberedningens förslag SOU, 1929 : 12), pp. 35 ff.) After pointing out certain advantages involved in the principle of domicile as compared with the principle of

The Scandinavian Conventions did not indicate a general break by Sweden with the principle of nationality, which was still retained in those statutes dealing with conflicts of law between Sweden and non-Scandinavian countries. Nevertheless, even in this sphere domicile has gained ground. Thus the Act of 1904, governing certain international relations concerning marriage and guardianship, ordains that actions of divorce or separation between foreign subjects may be brought before Swedish courts only when the defendant party is resident in Sweden or when both parties have resided at the same time in the country, but the defendant has deserted the plaintiff or moved out of the country after causes of divorce or separation have arisen. In order that divorce or separation may be granted, however, it is necessary that they should take place, and that grounds for them should exist, according both to the national law of the married couple and to Swedish law. If the husband and wife have no common nationality, both must be looked upon as subjects of the State of which they earlier were citizens, or if this has not occurred, as subjects of the State to which the husband may belong. These regulations, which are in accord with the Hague Convention on divorce and judicial separation, appear in chapter 3, §§ 1 and 2 and in chapter 7, § 2. They meant, *inter alia*, that a Swedish woman who married the citizen of a country whose legislation was under Catholic influence, could not be divorced at all. This was the case, *e.g.*, if a Swedish woman married an Italian, even if the marriage had been contracted in Sweden and she had never gone with her husband to his home country, or if she had returned to Sweden, owing to marital discord, and had recovered her Swedish citizenship. The fact that a Swedish woman was completely incapable of obtaining a divorce accorded ill with the very liberal principles of the Swedish Marriage Code. Therefore, following the example of Switzerland, Sweden withdrew from the Convention on divorce and judicial separation and in 1934 instituted an amendment of the Act of 1904 which concerned Swedish citizens alone. According to this amendment, if one of the parties is a Swedish subject and if he (she) has for at least one year been a resident of Sweden, the Swedish courts are always competent to deal with the case, and the question as to whether there are any grounds for divorce is to be tried according to Swedish

nationality the Law-Drafting Board states: 'On the other hand, the fundamental reasons usually cited in favour of the principle of nationality become much less significant in the case of the mutual relationship between nations which are nearly related, which on the whole agree in legislative matters, which resemble each other culturally, and which possess a mutual knowledge of, and have mutual confidence in, each other's legal institutions'.

law. What had happened before the married party became a Swedish subject domiciled here cannot be given in evidence with a view to obtaining a divorce (chapter 7, § 2 (2)).

In consequence of the Second World War, Sweden has become an immigration country which has received streams of refugees from different quarters. A large group was formed by the Esthonians who sought asylum here when Russia annexed the Baltic States afresh in 1944. From the point of view of international law the Esthonian refugees are Soviet-Russian citizens, since it has been decreed, by a decision of September 7, 1940, given by the Supreme Council of the Soviet Union, that citizens of the Esthonian Soviet Republic shall be citizens of the Union from the day, August 5, 1940, of its incorporation into the Soviet Union. Moreover, Sweden has *de jure* recognised the Russian annexation of the Baltic States. The fact that a Baltic refugee is considered a Russian citizen may have legal consequences in various respects. Thus it may mean that his right of marriage must be tested by Russian law. The consequence of this would be, for instance, that Esthonian refugees could not contract marriage with Swedish subjects, since Russian law prohibits marriages between citizens of the Soviet Union with foreigners. With special reference to the Esthonian refugees, an amendment of the Act of 1904 was therefore made in 1947. Under this, a foreign citizen can demand that Swedish authorities apply Swedish law in testing his right to contract marriage if he has a Swedish domicile and has been resident in Sweden for at least two years (chapter 7, § 4 (*a*)). This special regulation, which thus recognises the principle of domicile, applies only to subjects of those States which are not parties to the Convention on marriage of 1902.[23]

The amendment of 1947 was a makeshift designed for the most distressing situations. It improved the status of the foreign refugees by enabling them to marry on the conditions applicable to Swedish citizens. But other problems remained, such as the right to petition for separation or divorce. Since the refugees were foreign citizens, the Swedish court would have jurisdiction only if the respondent were domiciled in Sweden and therefore these remedies would be unavailable to a married party who alone had found refuge in Sweden. Also, even in a case falling under the jurisdiction of the Swedish Court, judicial separation or divorce could be granted only if they might take place and if grounds for

[23] At the present moment, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania, Sweden, and Switzerland are parties to the Convention on marriage.

them existed both according to Swedish and according to Soviet-Russian law. Before, however, any scheme for a fresh alteration of law had been introduced, the problem of the status of the Esthonian refugees was dealt with by two decisions of the Supreme Court of Justice, which represent a new departure in Swedish case law.

One case, Swedish Supreme Courts Reports (Nytt Juridiskt Arkiv) 1948, p. 805, dealt with the question of Swedish jurisdiction. An Esthonian man had applied for separation according to the Marriage Code, chapter 11, § 6, which paragraph concerns divorce where the defendant spouse has been absent for the last three years and is not known to be alive. Another case, Swedish Supreme Court Reports, 1949, p. 82, referred to a joint application for separation presented by husband and wife, both domiciled in Sweden. In the two cases, the lower courts had assumed that the law of nationality must be applied in accordance with the Act of 1904. The Supreme Court, on the other hand, took a different view. In spite of their Soviet-Russian citizenship, Esthonian refugees should be put on a level with persons without citizenship. Stateless persons being in the eye of Swedish law subject, in personal respects, to the law of their domicile, Swedish jurisdiction must be exercised, and the case must be decided according to Swedish law.[24] The first decision was reached by a majority of four members against one. In the second case, all members of the Supreme Court agreed upon the material issue but, with regard to their opinions, were divided into two groups.

The reasoning in the case of 1948 is fairly brief. The court held that the Act governing certain international relations concerning marriage and divorce does not specially provide for those who ' hold no citizenship or, though possessing a citizenship, do not enjoy the protection of their native country '. It is further stated that the case related to an Esthonian political fugitive, resident in Sweden, who had no intention of going back to Russia.

In the 1949 case three judges out of five gave a joint opinion which defines in greater detail the law on the subject concerned. After stating that the parties were political refugees who did not enjoy Soviet-Russian protection and did not intend to return, the

[24] In the case, *Swedish Supreme Court Reports*, 1939, p. 96, the law of the country of domicile was applied in a dispute of inheritance from a person who had emigrated to the U.S.A. and had become denaturalized after losing his Swedish citizenship without acquiring an American one. See also *Swedish Supreme Court Reports*, 1914, p. 305. The case concerned *bona vacantia* resulting from the death in Sweden of a denaturalised person. Cf. Karlgren, *Internationell privat-ochprocessrätt*, 1950, pp. 79 ff, and Michaeli, *Svensk Juristtidning*, 1944, pp. 763 ff.

judges held that their Soviet-Russian citizenship was of 'a wholly formal nature'. When the Act of 1904 was drafted, the legislator had apparently not reckoned with the occurrence of this kind of citizenship. Although the statutory regulations recognise that citizenship governs the personal law, yet 'it would be incompatible to attach to citizenship of the nature referred to the paramount importance that these regulations involve. Rather, the arguments leading up to the idea that Stateless persons ought to be subject to the law of their domicil, must on important points be considered applicable also to foreigners holding the status referred to and who consequently have no real connection with their native country'.

The case of 1948 only concerns the question of the application of the 1904 Act. The majority opinion appearing in the decision of 1949 has a wider scope. The view seems to have been that, with regard to refugees holding the status referred to, the principle of domicile shall be applied to all legal questions concerning their personal law. If this assumption is correct, Swedish law would, *e.g.*, determine the right of inheritance to an Esthonian refugee who was domiciled in Sweden at the time of his death.

The principle of nationality is still the main rule of Swedish law, but its sphere has in course of time been appreciably restricted in favour of the principle of domicile. The question remains: are there any reasons why the Swedish legislator should adhere in the future to the principle of nationality?

In assessing the respective merits of nationality and domicile, it is essential to distinguish between the different motives that have been determinant.

As was hinted above, the question is bound up with a technical problem. It was said that it would be easier to determine nationality than to determine domicile, since in determining domicile one would have to consider the purpose of the residence and perhaps also its permanency. This may formerly have been a sound argument, but it is doubtful whether it holds good any longer. Owing to the political changes brought about by the Second World War, it will often be difficult to determine a refugee's nationality. On the other hand, to decide a person's domicile does not necessarily involve the application of a complex set of rules. The practicability of this test depends to a large extent upon the way in which it is construed. Incidentally, it may be observed that as far as Swedish law is concerned, we have met with no difficulty in applying our rules of domicile. This may partly be due to the fact that the settling of the question of domicile is facilitated in those cases where the legislation requires proof of

residence for a certain minimum of time, partly to the fact that Swedish law on this point is still flexible.

The expectation that nationality would become the universal test no doubt favoured its adoption by Sweden, and, indeed, during the second half of the nineteenth century it gained ground in one country after another. It soon became clear, however, that universal agreement was unattainable and that a clash between the Continental and the Anglo-Saxon systems of law was inevitable.

The arguments that have been adduced in favour of the principle of nationality have principally been drawn from Mancini's theory of the individual's relation to the State and the claim of the individual that his national law should be respected all over the world. The Dane Borum, who for a long time was alone in Scandinavian literature in discussing the instant question, argues chiefly along these lines in his treatise *Personalstatutet* of 1927. Citizenship was the strong and enduring tie linking the individual to the State, for it obliged the individual to obey the law of his native country in whatever part of the world he found himself, while on the other hand it allowed him to claim the protection of his native country. The complex of rules that fell under the personal law, the regulations on minority, on marriage, etc., was designed to protect the individual. What community would be more suited to give him protection than his native country? [25]

Mancini's doctrine consists of a number of dogmas which ought to be regarded as illusions by modern man. Reality has turned out differently from what the poet thought. Millions of people have fled or are longing to flee from their home countries. If the principle of nationality is stripped of its dogmatic elements, however, it does raise two practical considerations. First, every legislator has to consider whether it is a matter of concern or not that his laws should be respected by foreign States, and the possibility of carrying through such a programme. Secondly, he is confronted with the question of the extent to which the authorities of his own country ought to pay regard to foreign law. The two issues, may, however, be connected with one another. It is possible that the treatment of foreigners may have a bearing upon the question how your own countrymen resident abroad will be treated by a foreign State.

It is evident that the adherents of the principle of nationality have considered the first question as the central one. This side of the problem seems actually to have inspired the declaration by

[25] Later on, Borum shifted his ground. See *e.g.*, the opinions expressed in *Lovkonflikter*, 3rd ed., 1948, p. 60, pp. 92 ff.

the Swedish Legislative Council in connection with the Scandinavian Convention of 1931. As mentioned before, the Council declared that it was most important to apply the principle of nationality to the citizens of countries totally dissimilar in matters of law and civilisation, while the case was different with regard to the relationship between kindred peoples adhering to similar standards of law.

The assertion of Swedish law abroad is, like the assertion of other Swedish interests, a matter of public international law. It is natural that Swedish private international law ought, within certain limits, to be governed by consideration for foreign States if by this procedure we can hope to gain anything on our own account. If that should not be the case, other considerations instead must determine the question how Swedish authorities ought to act with regard to foreigners. If the problem is viewed in this light, the fundamental reason why Sweden should prefer the test of nationality to that of domicile disappears, for from the point of view of international law it is indifferent which principle we apply. It is true that under favourable circumstances international intercourse is based on the principle of mutual concessions, and it must therefore be taken for granted that Swedish private international law has to pay a certain regard to foreign law. But the principle of nationality exceeds this purpose. The principle of domicile gives sufficient scope for foreign law. There is nothing to show that Swedes abroad have had any advantages over Danes and Norwegians because Sweden adheres to the test of nationality while Denmark and Norway build upon the test of domicile.

From the internal viewpoint the doctrine of nationality is a handicap. This is best shown by the many exceptions that Sweden has been obliged, in the last few years, to make in favour of the principle of domicile. As regards foreigners in Sweden, coming from countries dissimilar in matters of law and civilisation, the actual situation is rather the opposite of that mentioned in the declaration made by the Swedish Legislative Council in 1931. The amendments of the Act governing certain international relations concerning marriage and guardianship are sufficient evidence. In 1934 the domestic rules on divorce and separation were applied when Swedish women had married foreigners, and in 1944 it was made possible for Esthonian refugees to contract marriage with Swedes. On the same line are the precedents of 1948 and 1949, which concerned the appropriate law in divorce and separation suits of Esthonian refugees. In relations between kindred peoples such as the other Scandinavian States, it is less essential, however, which principle is chosen by the Swedish legislator, for the result is on the whole always the same.

Swedish international family law is in want of general revision. A review has indeed been promised. The amendment of 1947 was a temporary arrangement. Introducing the bill the Minister of Justice pronounced that Swedish international matrimonial law and related parts of the law of family ought to be taken under general reconsideration.[26] A revision is justified also for another reason. The statutes of 1904 and 1912, adopting the Hague Conventions, are based on the principle that a married woman shall follow the law of her husband, and are thus at variance with the general principles of Swedish family law, according to which husband and wife are equals. The adoption in 1950 of a new Act on Swedish nationality has made it more evident than before that this state of affairs is unsatisfactory. In contradistinction to the earlier law, a married woman is today fully independent in respect of citizenship. Thus a foreign woman who marries a Swede becomes no longer automatically a Swedish citizen. A Swedish woman who marries a foreigner does not lose her Swedish citizenship, even if she should acquire a foreign citizenship and set up her home in the new country. When the Legislative Council gave its opinion on the bill concerned, it stressed the urgency of carrying out the investigation earlier suggested.[27, 28]

The drafting of new rules will likely be a common Scandinavian affair.

It would seem that the principles laid down in the Scandinavian Conventions on international family law ought further to be made applicable in relation to citizens of other countries. Although certain limitations may be called for, this line would be more suited to a country like Sweden than continued adherence to the principle of nationality as it appears in the statutes of 1904 and 1912.

FOLKE SCHMIDT.[29]

A FOOTNOTE

The editor has kindly allowed me to add a note to Professor Schmidt's article.

The lament of the private international lawyer, irrespective of his origin, is the competition between nationality and domicile as the determinant of the personal law. Uniformity of the personal

[26] Proposition 1947, No. 324, p. 5.
[27] Proposition 1950, No. 217, p. 86 (Judges Geijer, Lech and Beckman), p. 89 (Judge Quensel).
[28] The importance of a revision of international family law was stressed also by the Judicial Parliamentary Committee in its report on the bill. Report of the First Judicial Committee 1950, No. 27, p. 28.
[29] Professor of Law, University of Stockholm, Sweden.

law is obviously desirable, for reason and justice prescribe that questions of status should be governed by one and the same law all the world over. It is distressing, for instance, that whether a person has been effectively married or divorced should be determined by one law in the courts of country X, but by an entirely different law in the courts of Y. It is inconvenient, to say the least, that the appropriate law to govern testate and intestate succession to movables should vary with the country in which the issue is raised. Nevertheless, such is the position in the modern world. The flight from the universal criterion of domicile, started by the Code Napoléon, became so precipitate, that at the present day some thirty countries, including France, Belgium, Germany, Italy, Spain, Sweden and The Netherlands, make nationality the test of the personal law. The gravest feature of this conflict is the obstacle that it raises to the unification of Private International Law, and therefore perhaps the most significant and gratifying feature of Professor Schmidt's article, at any rate to an Anglo-Saxon lawyer, is its disclosure of a growing tendency in Sweden to swing back to the classic test of domicile. The Anglo-Saxon lawyer prays fervently and constantly for the conversion of his nationalistic brother, since he regards it as axiomatic that if the personal law is to be the law of the country with which the *propositus* is most intimately and permanently connected, it is domicile, not nationality, that most surely represents this connection. But we English lawyers must beware of complacency. It is all very well to advocate the superior virtues of domicile, but the question remains whether the present English law on the subject is satisfactory. Is the English doctrine suitable as a universal criterion of the personal law? Discussions with foreign lawyers have given me the impression that many of them favour the substitution of domicile for nationality, but that they are not prepared to accept *in toto* the rules that have grown up in this country. There are certain features of the English law to which they take exception. Without going into detail, it may, therefore, be useful to explain what the impartial observer finds surprising in the English doctrine.

His first criticism is fundamental. He feels that the very definition of domicile is uncertain and inclined to be unrealistic.

It is probably accurate to say that according to Continental law domicile is equivalent to home in the popular sense. A man is domiciled in the country where he has his *habitual residence*. This is as it should be, for, since the most important matters that fall within the scope of the personal law relate to the family or the family property, it is reasonable that they should be subject to the law of the country in which the *propositus* has established his home.

It would appear that this was perhaps the prevalent view in England in the mid-nineteenth century. Just under a hundred years ago, Kindersley V.-C. concluded that the following definition represented the leading decisions on the subject of acquired domicile :—

> 'That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home '.[1]

It would be difficult to better this statement. Every word merits attention. Its most important feature, having regard to later developments, is the meaning that it ascribes to the critical word *permanent*. It regards the present home of a man as his domicile, even though his intention may be that upon the occurrence of some event which at the moment is uncertain and which perhaps may never occur, such as the amassing of a fortune or a change in the form of government, he will move his home elsewhere. The requisite state of mind is nothing more than a present intention of indefinite residence. Chitty J. accepted this view a generation later when he adopted Story's well-known definition :

> 'That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom '.[2]

It cannot, however, be any longer said that the weight of judicial authority supports this reasonable interpretation of the word 'permanent.' The meaning of intention has been strained to include the unsubstantial fancies of an optimistic or a fearful mind. From *Bell* v. *Kennedy* [3] in 1868 to *Ramsay* v. *Liverpool Royal Infirmary* [4] in 1930, it has on several occasions been solemnly pronounced by the House of Lords that the present habitation of a man is not to be deemed permanent and therefore sufficient for domicile if he looks forward to some event, however uncertain or problematical, which may induce him at an indeterminate time in the future to change his residence. The House of Lords, in its wisdom, denied that the domicile of origin in New Jersey of Mr. Winans had been affected by his continuous residence for the last forty-seven years of his life in other countries and mostly in

[1] *Lord* v. *Colvin* (1859) 4 Drew. 366.
[2] *Craignish* v. *Craignish* [1892] 3 Ch. 180, 192.
[3] (1868) L.R. 3 Sc. & Div. 307.
[4] [1938] A.C. 588.

England. The dim hope of being able at some time to return to the U.S.A. gave an air of impermanence to his English home.[5] The work-shy Scotsman, George Bowie, moved from Glasgow to Liverpool in 1892, with the view of living on the bounty of his brother and sisters. After the death in 1920 of his last surviving relative, he continued to live there until he himself died in 1927. He never once returned to Scotland. Yet, the House of Lords held that he died domiciled in that country. In the unanimous opinion of their Lordships, his continuous residence in England for the last thirty-five years of his life was of little account, since they inferred that had his English source of supply failed he would have taken refuge in his native land.[6] A South African court has reached even greater heights in this devotion to immutability. A man, domiciled in South Africa, deserted his wife and established his home in Southern Rhodesia, where he had obtained permanent employment. Nevertheless, a Rhodesian domicile was denied him, because, in the words of the trial judge, 'his intention to live in Rhodesia was subject to the qualification that his wife must be nowhere near him, and always at the back of his mind he seems to have had the intention that if she did follow him he would be prepared to leave any country to which he had gone'.[7]

These and similar decisions have an immediate and decisive effect upon the mind of a foreign lawyer. He loses any affection he may previously have felt for the English theory of domicile. He not unnaturally boggles at this insistence that even a life-time's residence must be scrutinised with fastidious particularity in the light of the visionary schemes and fluctuating hopes that may from time to time have influenced the resident. How, our foreign friend will ask, is a practitioner to advise his client with any confidence if, in this far-flung inquiry into intention, so much turns upon the weight to be given to this or that factor? One of the imponderables is the mental outlook of the judge. What is significant to one mind will seem of trivial importance to another. The ill-founded hopes of Mr. Winans swayed Lord Macnaghten, but were dismissed almost with contempt by Lord Lindley. Again, it does not escape the foreign lawyer that if phenomena so numerous and so varied are relevant to the issue of intention, if the investigation is to range over so wide a field, then the cost and duration of a contested suit will not be inconsiderable. In short, the identity of the personal law under the English rules appears to the foreigner

[5] *Winans* v. *Att.-Gen.* [1904] A.C. 287.
[6] *Ramsay* v. *Liverpool Royal Infirmary* [1930] A.C. 588.
[7] *O'Mant* v. *O'Mant* [1947] 1 S.A.L.R. 26.

to be, not the comparative certainty that is desirable, but only too often a matter of doubt and perplexity.

Are these criticisms just? At the risk of being convicted of *lèse-majesté*, it may, perhaps, be suggested that in practice full faith and credit is not always given to these pronouncements of the House of Lords. Indeed, any student of Private International Law can name many cases in which a judge of first instance, anxious it may be to uphold a decree of divorce in the interests of justice, has found domicile in a residence that is distinguished by more than a suspicion of evanescence. To shut a blind eye to strict principle may occasionally be commendable in this work-a-day world, but nevertheless the dogma of permanency remains on the books, as it were, and as long as this is so, as long as, in Westlake's words, 'the intention necessary for acquiring a domicile of choice excludes all contemplation of any event on the occurrence of which the residence would cease',[8] the English definition of domicile will neither appeal to foreign eyes, nor, if strictly applied, will it invariably serve the ends of justice and social convenience. It should not, however, be difficult to frame a statutory definition, easy to understand and simple to apply.

Apart from the difficulty of an irrational definition, there are other defects that disfigure English law. Chief among these is the excessive importance attributed to the domicile of origin, which, as compared with the domicile of choice, has been placed on so lofty a pedestal that it is more akin to nationality than to domicile in the Continental sense. There is no need to stress further the abnormal reluctance of the courts, evidenced by such decisions as *Winans* v. *Att.-Gen.* and *Ramsay* v. *Liverpool Royal Infirmary*, to find an intention in favour of its abandonment, but what deserves a little consideration is the doctrine of revival. The notion that the domicile of origin remains in the background, ever ready to fasten upon a man the moment that he abandons a domicile of choice, is capable of producing the most unrealistic and undesirable results. The strange impact that it may have upon the facts of life is evident from the following hypothetical example.

> X was born in India of parents, who, though long resident in that country, were domiciled in England. His domicile of origin is therefore English. At the age of 25, on the death of his parents, he succeeds to the family fortune and is advised in the will of his father to settle in the ancestral home in Yorkshire. For political reasons best known to himself, however,

[8] *Private International Law* (4th ed.), p. 338, sec. 264.

his resolution is adamant that at all costs he will never set foot in England. Instead, he establishes what he conceives to be his permanent home in France. After residing there for forty years, however, he becomes apprehensive of the political situation, leaves the country with the intention of never returning and takes temporary apartments in a hotel at Monaco, being undecided whether to settle in Holland or in Germany.

Immediately upon his departure from France, his English domicile of origin revives and remains attached to him until he has chosen a new home, whereupon it is once more placed in abeyance. Thus, during his stay in Monaco, which may be prolonged, his personal law is the law of a country which he has not yet visited, which he intends never to visit, and for the legal system of which he feels a certain repugnance. The situation is almost Gilbertian. Observe some of the consequences. If he desires a divorce, the only court in the world to which he can resort is the English court. If, during his residence in France, a child was born to him by a woman not his wife, a judicial affiliation decree now given by a French court in accordance with the law of November 16, 1912, will be ineffective, since such a mode of legitimation is unknown to his momentary *lex domicilii*. If he dies intestate his movables will be distributable according to the English rules and English death duty will be payable. If he leaves a will which *in substantia* is void by English law, though valid by French law, his testamentary dispositions fail. His continuous residence in France for forty years counts for nothing when balanced against his technical, though fleeting, domicile in England. Yet the inference seems reasonable that he would expect and prefer the disposition of his property to be regulated by the legal system to which he has voluntarily submitted for so long and with the general nature of which he has no doubt been familiar.

The situation becomes even more extravagant if a slight alteration is made in the hypothetical facts.

The *propositus*, instead of leaving France for a temporary stay in Monaco, definitely resolves to settle in Germany for good, and to that end boards a ship at Calais for Kiel. He dies *en route*.

In these circumstances, his domicile of origin is re-animated for a few hours and he dies subject to English law. He lost his French domicile of choice the moment that he stepped on board and there could be no acquisition of a German domicile while he was on the high seas. Migrants are, indeed, confronted with a new terror to death.

This example of a death *en route* for a new home induces on

last question. Is it reasonable to insist that there are no possible circumstances in which domicile can be constituted by intention alone? Nothing is better established than the rule which requires the concurrence of both residence and intention for the acquisition of a fresh domicile. As a general principle this rule is unexceptionable, indeed almost inevitable, but if it is to be applied in a remorseless and mechanical manner, without any relaxation to meet exceptional circumstances, the result must occasionally be to frustrate the designs and expectations of the party affected. The invalid will of Mrs. Raffenel serves as a warning.[9] It seems unfortunate that such a vital matter as the effectiveness of a testamentary disposition should turn upon an uncontrollable and accidental event, and it surely would be more reasonable to admit that an incontestable intention to take up a permanent residence in another country should suffice for a change of domicile, provided that some decisive and unequivocal step towards actual removal has been taken. There is no cause to fear that this concession would raise insuperable difficulties of proof, for if the court were not convinced beyond possible doubt that the intention was genuine it would fall back on strict principle.

The present reluctance to give credit to mere intention has repercussions upon other branches of Private International Law, among which may be mentioned that concerned with the effect of marriage upon the mutual proprietary rights of husband and wife, where there has been no express or implied contract. By what legal system is this question settled? A recent South African case illustrates the difficulty.[10]

> H. was domiciled in Germany, W. in Czechoslovakia. They married each other in Czechoslovakia in 1933, and there was undisputed evidence that they had determined and agreed to live, neither in Germany nor in Czechoslovakia, but in Johannesburg, where H. had been promised employment. They duly arrived there about four months after the marriage and H. took up his appointment, but four years later his employers appointed him manager of a business in Durban, whereupon he and W. moved their residence to that city with the intention of remaining there indefinitely. H. died some ten years later and the question was whether the rights of W. to his property were to be regulated by German or Natal law. The former denied, the latter granted, community rights to her.

In circumstances such as these the Scandinavian Treaty wisely and sensibly refers the matter to the law of the country in which

[9] *In the Goods of Raffenel* (1863) 3 Sw. & Tr. 49.
[10] *Frankel's Estate* v. *The Master* [1950] S.A.L.R. 220.

the parties take up their residence after the marriage. The English rule is far from clear, but a view widely held and based upon the unsatisfactory case of *Lashley* v. *Hog* [11] is that the question is governed by the law of the husband's domicile at the actual moment of the marriage. In the instant case, the South African Court of Appeal adopted this mechanical and arbitrary test and applied German law. Thus the legal position of the parties was measured by the law of a country which the husband had abandoned, in which he had not lived with his wife and which for political and racial reasons it was probably unsafe for him even to enter. This decision is open to criticism in at least two respects : it completely disregards the presumed intention of the parties and it offends the sociological principle that the relations of husband and wife shall be governed by the law of the country in which in fact they establish their home.

One stock answer to the theory that this question of marital property should be governed by the law of the intended home or of the intended matrimonial domicile, call it what you will, is that intention, unfortified by some degree of residence, can never provide a basis for the choice of law in this particular field. It may be replied, however, that to forbid all deviation from strict principle may well mean the sacrifice of justice and convenience for doctrinal orthodoxy.

In conclusion, it is suggested that perhaps the time has arrived when the legislature might amend the English law of domicile in certain respects and might also assimilate it more closely to Continental doctrine.

G. C. CHESHIRE.

[11] (1804) 4 Paton 581.

GERMAN ENEMY PROPERTY—III

(*Concluded from p. 551, ante*)

VIII

The requirement of the relation which must exist between the enemy as defined in the Act and the property as defined in the Act is described in the following words :

> ' which on or at any time after the third day of September 1939 belonged to, or was held or managed on behalf . . . '.

There is no need to explain the terms employed here which speak for themselves. It may be sufficient to point out that a mere control by the enemy as such is not sufficient to render the property subject to treatment under the Act. The control test is confined to corporations only. Thus the property of a neutral who leaves the control of all his affairs to an enemy remains free from treatment under the Act. This may seem to be an inconsistency. But there can be no doubt that this is the law.

Although the words just referred to are apparently clear and unambiguous it can safely be predicted that their application will result in a number of particularly difficult problems. It may be sufficient to refer here to a few of these, without any pretence of exhausting the topic or of anticipating even the most important of those cases in which doubtful points may have to be decided.

(a) In the first instance attention must be drawn to the fact that the scope of application of the definition is in effect somewhat narrower than would appear at a first glance in consequence of the rule of section 4 of the Trading with the Enemy (Custodian) Order, 1939. This rule reads as follows :

> ' No person shall, without the consent of the Board of Trade, save as directed by this Order, transfer, part with or otherwise deal with the property of an enemy '.

This rule blocks the property in this country of all persons who were during the war enemies in the meaning of the Trading with the Enemy legislation, whether belligerent or merely technical. Any dealing with such property is not only prohibited, but also void, *i.e.*, legally of no effect. If, therefore, a French or Belgian owner during the period of the occupation of his country by German troops—whether under pressure or

not—sold his business with all its assets to a German, no transfer of rights in this country took place and notwithstanding any clauses in such a contract, the assets still belong to the person who owned them at the time when the occupation began. The rule of section 4 is so widely drawn that it protects not only nationals and residents of Allied territories, but is also of considerable importance in delimiting the conception of German property from that of Italian, Bulgarian, Roumanian and other satellite property. Where a Roumanian sold his business during the time during which Roumania was legally enemy territory to a German residing in Germany including all its assets and debts, it would appear that any property in this country forming part of the business would not be included in any transfer of this type but would remain Roumanian property. In this connection it is of importance to remember that a number of countries were technically enemy territory either some time before the government of the country was actually at war with His Majesty's Government or although they were—as, *e.g.*, the principality of Monaco—from the point of view of international law never at war with His Majesty's Government.[60a]

(b) It is interesting to compare the provisions in regard to the requirement of relationship contained in the Act with those of the Brussels Rules. According to the latter the charge extends to all assets which on January 24, 1946, were owned (or but for their seizure would have been owned) directly or indirectly by the various types of enemy persons. This rule is supplemented by a further rule which extends the charge to assets under control and not intended to be released which were owned (or but for their seizure would have been owned) directly or indirectly by any individual of German nationality who died before January 24, 1946. As we have seen before, assets in this country which at the outbreak of the war belonged to an enemy could not be the subject-matter of a transaction *inter vivos*. Until January 24, 1946, no general licence to trade with a German in Germany had been granted. A German in Germany could not therefore between the outbreak of the war and January 24, 1946, transfer ownership of any assets in this country belonging to him by way of a transaction *inter vivos*. If he acquired any such assets by such a transaction before January 24, 1946, *e.g.*, in the—most unlikely—case of a German acquiring the entire business of a neutral resident including its assets in this country before January 24,

[60a] See on this point the convenient summary in Howard, *Trading with the Enemy* (1943), p. 105.

1946, such assets may be distributed under the Act, provided they were subject to custodian control on the date to be determined by Order in Council. To this extent—notwithstanding the apparent difference in the respective dates—the results obtained by the application of the Act are the same as those obtained by applying the rules. The difficulties begin, as far as transactions *inter vivos* are concerned, after January 24, 1946. If a German after January 24, 1946, but before March 29, 1949, the day on which all the restrictions under the Trading with the Enemy Act, 1939, were finally abandoned, acquired the business of a neutral by way of a transaction *inter vivos* including its assets in this country, these assets were liable to be taken under control in accordance with the Trading with the Enemy Act, and may be distributed under the Distribution of German Enemy Property Act. But they are not included in the charge under the Brussels Rules of Accounting. To this extent therefore the Act deviates from the rules.

This deviation becomes much more far-reaching where acquisition *mortis causa* is under consideration. Under the rules all property acquired before January 24, 1946, is subject to the charge. The same applies to all assets of an individual of German nationality who died before January 24, 1946, provided they are not released. Under the Trading with the Enemy Act, 1939, and the General Licence of March 29, 1949, assets are subject to control in many cases if they were acquired long after January 24, 1946. As we have seen before, it is not inconceivable that for many years to come property which is not under control now, will have to be taken under control on the ground that it was acquired by a German under a will proved before March 29, 1949.[61] There can therefore be no doubt that the English Acts go considerably further in extending the notion of assets subject to control and distribution, than do the Brussels Rules in defining the assets subject to the charge.

(c) Both under the Act and under the Brussels Rules a problem of a very peculiar character arises which may be shortly characterised as that of the relationship between the Act or the Rules on one hand and the measures of internal restitution in Germany or elsewhere on the other. By internal restitution may be understood the reversal of acts of spoliation committed by Germans otherwise than in consequence of the outbreak of the war. These acts of spoliation comprise the enforced sales of businesses in Czechoslovakia and Austria during the German occupation before the outbreak of

[61] See p. 407, *ante*.

the war. But the most important group to be included among these acts of spoliation is formed by acts committed in consequence of racial and political persecution in Germany itself. Since 1933 a considerable number of persons, largely, but by no means exclusively, of Jewish descent or Jewish faith, have left Germany as refugees. These persons were not resident in Germany on September 3, 1939. Nor were they resident or physically present there on January 24, 1946, as provided for by the Brussels Rules. In many cases they lost their German nationality long before the outbreak of the war, either by acquiring a foreign nationality or by becoming Stateless persons. Assets belonging to these persons would therefore not be subject to the charge under the rules or to treatment under the Act.

However, either after or before their emigration persons in this category were not infrequently compelled by very divers methods to sell, or were in some other way deprived of, their businesses in Germany, which in many cases will have included the title to assets in this country. The assets in question thereby became the property of the purchaser who in nearly all cases in question was a German residing in Germany at all material times. This German in Germany continued to own the property in question until such time when after the collapse of the Nazi regime laws were enacted in the various countries or—in the case of Germany herself her different zones of occupation—in the various parts of Germany redressing the wrongs committed during the Nazi period. Apart from the case of Czechoslovakia none of the laws in question came into force before January 24, 1946. Thus at the first glance one might be inclined to argue that whatever may have been done at a later date the assets in question were owned on the crucial date by a German in Germany and thus subject to the charge. Similarly one might be inclined to say that—without regard to the various laws passed after the end of the Nazi régime—it still remains true that the property in question was owned by, or held or managed for, a German residing in Germany at some time after September 3, 1939, and is thus liable to be treated under the Act of 1949. This is a conclusion which, it would seem, would not be found very attractive, because it would result in treating as German enemy property not inconsiderable assets which got into German hands only in consequence of methods and acts of spoliation whose redress has been a declared aim of Allied policy,[62] and which were reversed both

[62] See Interallied Declaration against Acts of Dispossession, *Gazette of the Allied Control Council in Germany*, Supplement No. 1, p. 3.

outside and inside Germany by legislative acts designed to restore to victims of Nazi persecution what had been taken from them. It would mean that property taken from persons considered by Germany as Germany's enemies and, in many cases from Allied nationals by acts of spoliation, would serve to pay sums due from Germany on reparation account. It is easy to give examples showing the unfair hardships which would be caused by disregarding the special circumstances of this type of case. A, a German Jew, emigrated from Germany to this country in 1934, where he became naturalised in 1939, serving throughout the war in the British army. He left in Germany an export business, but in 1939 under an order from a special office dealing with the confiscation of Jewish properties a commissar was appointed who sold the business in August, 1939, to a German competitor for a small sum of which the emigrant had no benefit, as it was paid into a blocked account which in 1941 was transferred entirely to the coffers of the Reich. A sum of money was standing in a bank in this country in August, 1939, in the name of the emigrant's Berlin business, but the bank received due notice of the transfer of the business by the commissar and consequently reported the account after the outbreak of the war to the Custodian to whose orders it is now held. It would clearly not be an equitable solution to treat this account as German enemy property within the meaning of the Act. It is, however, not quite so easy to see, how this solution can be avoided.

One might be inclined to consider the legislation in Germany, Austria and Czechoslovakia which restored dispossessed property to its former owners as offering a convenient way out. This legislation has to some extent retrospective effect. Thus under the restitution laws in force in the British and U.S. Zones of Germany and in the three Western Sectors of Berlin a decision by a restitution chamber restoring property, including businesses, to claimants has effect ex tunc: the dispossession is legally considered as not having been effected.[63] The successful claimant is considered never to have lost ownership of his property. There is a strong temptation to consider this rule as a satisfactory solution. One might say, that in answering the question whether a person was or was not the owner of certain property or whether such property was or

[63] There are two different laws, one being in force in the British and the other in the U.S. Zone of Occupation, both being styled Military Government Law, No. 59. The differences between the two laws do not extend to the fundamental approach to the problem, but they are not negligible. The leading commentaries on the U.S. Zone law are by Freiherr von Godin (1948), and Muller (1948), that on the British Zone law by Peters (1949). The rule referred to in the text is contained in both laws, it is s. 12 in the British Zone law and s. 15 in the U.S. Zone law.

was not held or managed on his behalf, on a certain date, we need not put ourselves into the position which existed on that date, which has long past. We may be said to be entitled to take as the focal point the position which exists today and taking into account all the events which have happened, including the effect of all legislation passed until now, to judge whether such ownership, legal or beneficial, existed on that date. Applying this method we might say that, keeping in mind the restitution legislation and its retroactive effect, the person who had profited from the spoliation was only apparently and not really the owner on that date. He appeared to be the owner because of the existence of the Nazi régime, but this was merely a passing appearance which has come to an end as soon as the rule of law has been restored in Germany herself and in the countries overrun temporarily by Germany. Unfortunately, this argument, even if it would appear to be acceptable, would be far from solving the difficulties. This follows from the nature of the rules relating to the restitution of dispossessed property in force at present in the various territories in question. It will therefore be necessary to examine these rules a little more closely.

In this connection it is necessary to state at the outset that the argument, just tentatively referred to, would leave one very considerable blank: there is no restitution law in the Soviet occupied zone of Germany.[64] As far as can be judged by appearances, such law, if it should ever come, would presumably benefit only persons inside Germany. To which extent it would have retroactive effect, is impossible to say. The laws in force in the British and U.S. Zone of Occupation and in the three Western Sectors of Berlin have such retrospective effect. They provide that the decision of a restitution authority or restitution chamber allowing a claim brought before such agency or chamber has the effect, that the loss of the property by the claimant is considered as never having taken place. But this retrospective effect is ascribed to the decision of the authority or agency. It does, therefore, not take place in those cases in which no decision is required because the matter is amicably settled between the parties or in which the opponent complies with the demands of the claimant without awaiting the decision.[65] The law in the French Zone of Germany as well as the

[64] With the sole exception of Thuringia where such a law was enacted as early as in 1945. It is, however, at present in practice inoperative.

[65] All the commentators seem to agree on this point, see Godin, *l.c.*, p. 49; Peters, *l.c.*, p. 101.

law in force in Austria provide, on the other hand, that all dispossessions effected by the Germans in connection with the Nazi régime have to be considered as void ex tunc.[66] The result is, therefore, that if English judges were to consider the law applicable to the act of dispossession as decisive for the question whether the property was or was not since September 3, 1939, owned by a German, a different solution would result in accordance with the different local laws and in accordance with whether or not an actual decision of a restitution authority or agency was obtained. In the case of the British and American Zones of Germany and of the three Western Sectors of Berlin the solution would therefore put a veritable premium on the attitude of those claimants who refuse any form of amicable settlement and insist on a decision, because only in their case would the retrospective effect take place which would exempt the property in this country from the application of the Act.

It is believed that this is so unattractive a solution that another approach to our problem must be sought. In the opinion of the present writer this can be found by disregarding entirely the rules of German and Austrian law on restitution. These laws can be disregarded if one assumes as the viewpoint of the English interpreter of the law September 3, 1939, and assumes that the legal position as it obtained then must be considered as binding upon an English court. This does not at all mean that an English court must in all circumstances consider the German dispossessor as having become the owner or holder of the assets in this country. In the first instance it will be noted, that as already stated before, the law of this country disregards any acquisition of assets which were under Custodian control at the time when the acquisition took place. This will effectively bar any transfer which took place after September 3, 1939. In the second instance the English courts will disregard any transfer which took place in consequence of a law which is confiscatory in character. Thus in *Frankfurther* v. *Exner* [67] a commissar appointed to conduct the business of the plaintiff, an Austrian Jew, had claimed to be entitled to the credit balance in London standing in favour of the plaintiff's business in the books of the defendant. The court held that the German decree by which the commissar had been appointed was of a confiscatory character and that it could not operate to transfer to the commissar the balance in this

[66] The French Zone law is Ordonnance No. 120. The leading commentary on this law is by Rothfels (1948). The Austrian law is the Dritte Rückstellungsgesetz of February 6, 1947 (Bundesgesetzblatt, No. 54), commentary by Heller, Rauscher and Baumann (1947).

[67] [1941] 1 Ch. 629.

country. Similarly in *Bohn* v. *Czerny* [68] a similar German Ordinance, enacted in Austria, was held to be ineffective in regard to property in this country. The fact that in these two cases the decrees in question were passed in countries other than Germany itself, is irrelevant in the present connection. In neither case was this fact in any way relied on by the court. In *Frankfurther* v. *Exner* it could clearly not be relied on, having regard to the fact that the incorporation of Austria into Germany had been recognised by H.M. Government. The decisive point was that in both cases the acquisition of the property in this country by the German owner would have amounted to an expropriation and as such could not be recognised by the English courts, even though the foreign Ordinances in question claimed to possess extra-territorial effect.

The question, therefore, would appear to be solely whether in the individual case, the acquisition of ownership by the German holder does or does not constitute an expropriation. In this connection the fact that the sale and transfer of the property was effected by a Government-appointed commissar forms no doubt a strong prima-facie indication that the 'sale' was in fact an expropriation. It is hard to imagine circumstances in cases of this type where the conclusion that the sale constituted an expropriation could be avoided. It is, however, submitted that the fact that the former owner either carried out the sale himself or that he collaborated in some form in the sale would not exclude the assumption that there was a confiscation. In *Novello* v. *Eulenburg* [68a] Mr. Justice Harman had to consider the effect of a transaction in Germany which consisted of two agreements. The first agreement consisted of a sale of a business by a government-appointed Custodian. The second was an agreement by which the owners of the business themselves purported to confirm by agreement with the purchasers the first agreement concluded by the commissar. This second agreement confirming the first was in a number of cases concluded at the instigation of more far-sighted profiteers from Nazi oppression, who realised that the sham-legality of the agreement concluded by the commissar would fail to deceive foreign business friends and also, therefore, wished to fortify their position by a confirmation from the owners themselves. Needless to say, that the appropriate pressure was applied to obtain such 'voluntary' confirmations, if it did not simply follow from the general conditions of the time and country. Harman J. refused to be deceived by this somewhat finer form of spoliation and held

[68] (1940) 190 L.T.Jo. 54.
[68a] Unreported, but referred to in [1950] 1 All E.R. 44.

that even in this form the transaction could not be recognised as effective by an English court.

As far as transactions are concerned where the sellers were Jews—this term being used in the sense of the respective German legislation, *i.e.*, without reference to the religion of the persons in question—it is submitted that any sale after April 26, 1938, must be considered to be ineffective, as far as property outside Germany is concerned. On that date a number of German Ordinances came into force which provided that all Jewish property within and without Germany had to be declared to the authorities and that every transaction relating to businesses conducted by Jews was subject to the consent of the administrative authorities.[69] Selling a Jewish business without such consent constituted an offence punishable with imprisonment, or even hard labour up to a maximum of ten years. This applied, too, in cases where the sale had taken place abroad.[70] The leading commentator of this law, Herr Schiedermair, pointed out that it constituted a preparatory step.[71] No great ingenuity would seem to have been required to understand what this dark hint was intended to mean. In fact, the few people who could not understand it did not have to wait long; an Ordinance of November 23, 1938, began what was in the statute book itself frankly described as the 'elimination of Jews from the economic life of Germany'[72]; by an Ordinance of December 3, 1938, power was granted to the administrative authorities to order the sale of Jewish businesses and to appoint commissars who could themselves conduct and finally sell these businesses.[73] It would appear to be clear, that any sale carried out under the threat contained in the Ordinance of April 26, 1938, must be considered as being nothing but a disguised form of confiscation. It would be inadequate if one would consider sales in the period between April 26 and December 3, 1938, as merely voidable and not void, as far as their effectiveness abroad is concerned. A threat by the legislator

[69] Verordnung über die Anmeldung des Vermögens von Juden, of April 26, 1938 (*Reichsgesetzblatt* I, p. 414), Ordinance supplementing this Decree of the same date (*Reichsgesetzblatt* I, p. 415), see also Carrying-out Ordinance of June 18, 1938 (*Reichsgesetzblatt* I, 640).

[70] The decree was applicable in Austria as well, as were all the later Ordinances referred to in the text.

[71] In Pfundtner-Neubert, *Das neue deutsche Reichsrecht* (loose-leaf collection of German laws), Vol. 3, Part e, s. 22. p. 1.

[72] Ordinance on the Elimination of Jews from German Economic Life, of November 12, 1938 (*Reichsgesetzblatt* I, p. 1580), Carrying-out Ordinance of November 23, 1938 (*Reichsgesetzblatt* I, p. 1694) and further subsidiary enactments, all reprinted in Pfundtner-Neubert, *l.c.*, Vol. 3, Part e, s. 27.

[73] Ordinance on the Deployment (Einsatz) of Jewish Property of December 3, 1938 (*Reichsgesetzblatt* I, p. 1709), see Pfundtner-Neubert, *l.c.*, Vol. 3, Part e, s. 22, pp. 15 ff.

personally clearly differs from one by a private person. It would have to be considered as equal in every respect to direct action by the legislator or the administration and consequently it does not appear to be unjust to consider sales effected during this period as nothing but a special form of confiscation.

IX

Where all the requirements so far considered are complied with, the property in question may nevertheless be excluded from treatment under the Act in consequence of section 1 (6). This subsection gives power to the Board of Trade to give a direction to the administrator requiring him to transfer to or for the benefit of any person specified in the direction any German enemy property or the proceeds of such property to which that person would have been entitled but for the the operation of the Trading with the Enemy Act, 1939, or its subsidiary legislation. The discretion granted to the Board of Trade is limited in this subsection in that the transfer in question (which is generally in everyday parlance referred to as 'release') may only be ordered in favour of the person who would, but for the Trading with the Enemy legislation, have been entitled to the property in question. The section allows the Board of Trade not only to grant a release in favour of the original owner and of those who have succeeded to him mortis causa, but also to other successors in title, as *e.g.*, assignees inter vivos because the assignment inter vivos, *e.g.*, of a claim against an English debtor would have been valid but for the Trading with the Enemy legislation. Such freedom of discretion would in fact appear to be required because, during the ten years which have elapsed since the beginning of the war, many events may have happened, such as amalgamation of companies, winding up of corporations, etc., which will require to be taken into account in the administration of this subsection. On the other hand, it is to be noted that the administrative discretion is not absolute : release can only take place in favour of the original owner and his lawful successor in title. In the case of private individuals claiming to have succeeded mortis causa to the original owner, the administration will be entitled to require production of English letters of administration. In the case of property formerly belonging to German public corporations, difficult questions of succession may arise, which cannot be discussed in the present connection.

Section 1 (6) may in fact have restricted rather than enlarged the freedom of discretion granted to the Board of Trade. Section 4 of the Defence (Trading with the Enemy) Regulations, 1940,

provided that a Custodian shall, if the Treasury so directs, pay or transfer to such persons as may be specified, moneys paid to him and property vested in him. It is not clear whether this section not only gave power to the Treasury to give directions, but also allowed the custodian to comply with such directions without regard to existing private rights. If this question were to be answered in the affirmative, the Treasury would by this section have had power to do with the assets in question anything it wished to do.[74] If this would have been the correct interpretation of the section, which is by no means certain, the power in question would as far as German enemy property is concerned now appear to be limited, section 1 (6) of the Distribution of Enemy Property Act being a later enactment than the Defence (Trading with the Enemy) Regulations and having therefore to this extent superseded the former enactment.

Section 1 (6) of the Act is virtually identical with section 3 of the Trading with the Enemy (Custodian) Order, 1939, with the proviso, however, that section 3 of the Custodian Order gave to the custodian power to pay or transfer the money or property not only to the original owner, but also 'to any person appearing to the Custodian to be authorised by such person to receive the same'. This proviso was required in war-time and had, no doubt, at a time when communications were interrupted, a most beneficial effect. It has, *e.g.*, enabled the Custodian in a few individual cases to make payments in respect of maintenance to relatives of enemies living in this country on proof that such payments had been regularly made during some considerable time before the outbreak of the war. The restoration of facilities for communication has rendered such extraordinary powers unnecessary and the Board of Trade will now have to apply the usual standards in order to ascertain the authority of the person purporting to act on behalf of the original owner.

The Brussels Rules of Accounting will, perhaps, nowhere more than in the administration of section 1 (6) be of importance for

[74] The present writer thinks that the question should be answered in the negative, because the purpose of the statutory provision was to leave the ownership in suspense until statutory effect was given to the Peace Treaties or until the coming into force of some other statutory ruling, such as the present Act, see *Re Gourju* [1943] Ch. 24 at 29; *Re Levinstein* [1921] 2 Ch. 251 at 255. Dr. Mann, *l.c.*, p. 49, says rightly that the Custodian is a trustee who holds the legal title for such beneficial owner or owners as may be determined—*i.e.*, by statute, not by directions from the Board of Trade or the Treasury. Where no such determination can be found to have been made by any of the Orders under the Satellite Peace Treaties, the forthcoming Austrian Peace Treaty or the Peace Treaty with Japan or by the present Act, it would appear that the original owner is (and always has been) the true owner. Where a vesting order was made the Custodian was the legal and the original owner the beneficial owner.

the practice of the Board of Trade under the Act. It is clear that the Board of Trade will be very strongly disinclined to release any assets which, whether released or not, will be deducted from this country's share in German reparations. In other words, releases will, as a rule, have to be confined not only to remaining within the limits set by section 1 (6) of the Act, but also to those assets which according to the Brussels Rules are not charged against this country's share in German reparations. It is impossible within the scope of the present article to deal fully with the various cases provided for in the Rules in which assets, if released, are not charged against reparation account. In practice the most important clauses are two : one which is intended to favour former British subjects and one which is intended to benefit victims of Nazi oppression.

Assets of a German national who is also a national or was formerly a national of an I.A.R.A. country and who was formerly a resident of that country and who has left Germany in order to establish his permanent residence in that I.A.R.A. country, may be excluded from the charge on reparation account, if they are released to him. The Rules add that it must be proved that the person in question was loyal to the Allied cause during the war and that his case merits favourable consideration. The last condition is perhaps not easy to understand : should not the case of a person who, although living in Germany, proved loyal to the Allied cause always merit favourable consideration? In any case, it deserves to be noted that the rule is strikingly narrowly worded. Assets of a former Belgian national who resided during the war in Germany and after the war left Germany in order to establish his permanent residence in Luxembourg, cannot be excluded from the charge, because he did not establish his permanent residence in the same I.A.R.A. country in which he had formerly had his residence. The British dominions who were signatories to the Paris Conference must, of course, be considered as individual countries, each of which is non-identical with the other and with the U.K. Thus the rule does not apply in the case of a former New Zealander settling after the war in this country or in Australia. On the other hand there is little doubt that even in the narrow form in which it has secured acceptance the rule will benefit a not inconsiderable number of British subjects. Cases of dual nationality are fairly frequent as between this country and Germany, having regard to the fact that the English law relating to nationality is based on the rule of the ius soli and German law on that of the lex saaguinis. Furthermore, the benefit of British nationality has in recent years been successively bestowed upon a number of

persons who were heretofore excluded from it and many of whom possessed also German nationality. Under the British Nationality Act, 1948, a number of persons are deemed to have been British nationals immediately before the coming into force of the Act. The Act, however, came into force after the granting of the approval to the Rules of Accounting by the Assembly of the I.A.R.A. The question therefore arises whether assets of a person who acquired British nationality under the 1948 Act can be excluded under the Act or whether the benefit of the rule is confined to persons who were already British nationals at the time when the Rules were approved. It is submitted, that the former interpretation deserves preference. The decisive date under the Rules is the final accounting under the Paris Agreement on reparations and not that of the adoption of the Rules. The latter date has no intrinsic significance either for the parties to the Agreement or to the individuals whose assets are under consideration. But the question is not free from doubt.

Assets of a German national may also be excluded from the charge if the individual in question was deprived of liberty pursuant to any German law, decree or regulation discriminating against religious or racial groups or other organisations and did not enjoy full German citizenship rights at any time between September 1, 1939, and the abrogation of such law, decree or regulation and has left Germany in order to establish his permanent residence outside Germany, provided he did not act against the Allied cause during the war and his case merits favourable consideration. The clause would not seem to have been drafted on the basis of an intensive study of the German legislation on religious, racial and political persecution and its wording may in practice result in difficulties and even hardships. It has recently been given great prominence because the Board of Trade has applied the same principles, laid down here, in regard to the release to their original owners of Hungarian, Bulgarian, Roumanian, Italian and Austrian assets. The practice of the Board of Trade in regard to these Satellite assets came under critical discussion in both Houses on the occasion of the various readings of the present Act and a promise of more benevolent treatment has been given by the government in the House of Lords.[75]

Though it is perhaps rash to venture a forecast, it is, I think, a legitimate expectation to assume that the provision in question will give much less reason for doubts in the case of Germany than in

[75] Lord Lucas of Chilworth, *Hansard*, House of Lords, Vol. 165, No. 135 (December 13, 1949), col. 1482: 'I hope that perhaps the treatment will be even more generous than in the past'.

that of Satellite countries, having regard to the fact that measures of persecution in Germany were both much more thorough and much more systematic than in the Satellite countries. It would appear that in practice the two most important questions will be whether a person was or was not deprived of liberty and whether he was at any time not in enjoyment of his full rights of citizenship. In regard to the first of these questions the chief difficulty will be that of persons who were not actually in a concentration camp, but escaped arrest and in most cases presumably death by keeping in hiding from the Gestapo. The decisive argument in favour of the assumption that such persons are covered by the rule is the fact that the provision of the Rules does not require actual detention, but confines itself to the stipulation that such persons must be 'deprived of liberty', *i.e.*, have been placed in a position where they were unable to enjoy freedom of movement within the limits which, in wartime, exist for the ordinary citizen not called up for national duties. Conditions of life of a person living underground in wartime Germany, unable to participate in even those scanty food rations which were allotted to the ordinary citizen, compelled to change his abode frequently, if not nightly, constantly in fear of arrest and all that it implied, were clearly such that it would strain the language of the rule to assume that such persons were enjoying liberty. On the other hand persons called up for duty in organisations, such as the 'Organisation Todt', cannot be considered to have been deprived of liberty, their service being in the nature of a national duty, even though this service would have been rendered in the armed forces or in some less odious capacity, had the person in question not been afflicted by some form of racial or political disability.

In regard to the requirement that the person in question did not enjoy full citizenship rights, it should be remembered that since the ill-famed Nuremberg laws of 1935, German law distinguished between nationality and citizenship, Jews as defined in the Reich Citizenship Law [76] being excluded from the latter, but not from the former, until the 11th Carrying-out Ordinance of the Reich Citizenship Law [77] excluded every German Jew outside Germany even of the former. Any person who under the Reich Citizenship Law was not a citizen, did, therefore, clearly not enjoy full rights of citizenship. The definition of 'Jew' by the Reich Citizenship Law is of some complexity and cannot be dealt with here in detail [78]: it may

[76] Of September 15, 1935 (*Reichsgesetzblatt* I, p. 1146).
[77] *Reichsgesetzblatt* I, p. 722.
[78] The leading commentary is by Lösener and Knost. See also Deisz, *Recht der Rasse* (1938), Stuckart and Schiedermair, *Rassen—und Erbpflege*, 4th ed. (1943). A good—and by no means uncritical—summary was written in

be sufficient to say that Jews within the meaning of that law were persons who had three Jewish grandparents and under certain circumstances also persons who had only two Jewish grandparents.

The Brussels Rules speak of 'full rights of citizenship'—not merely of 'rights of citizenship'. It is submitted that the word 'full' must be given a definite meaning. It is not an irrelevant addition. It is submitted that the answer to the question what that meaning is can be found in section 6 (1) of the Reich Citizenship Law which reads as follows:

> 'As far as in Reich laws or in Ordinances of the National Socialist Workers' Party and its formations requirements in respect of purity of blood are stipulated which go further than section 5 of this law, these requirements remain in force'.

The Charter of the National Socialist Party provided that only persons of 'purely Aryan descent' could become members of the party.[79] This rule remained in force notwithstanding the Reich Citizenship Law with the effect that persons who were under that law Reich citizens were, nevertheless, excluded from joining the Nazi Party. Persons who on the ground of their 'non-Aryan descent'—which need not be Jewish descent, but may be descent, *e.g.*, from coloured persons—were excluded from joining the Nazi Party must be considered as having been deprived of full citizenship rights on grounds of racial discrimination. The Nazi Party was, of course, the only permitted party, the continuation or formation of other parties being a grave criminal offence.[80] Persons excluded from the party by a statutory provision were, therefore, by law excluded from the entire political life of the country and cannot be said to have enjoyed full citizenship rights, even though they were theoretically styled 'citizens'. Further support for this thesis is supplied by the fact that as early as on December 1, 1933, a law was enacted with the significant title 'Law for Securing the Unity of Party and State'.[81] The first section of this law reads as follows:

> 'After the victory of the national socialist revolution the National Socialist Party is the bearer of the German State idea and insolubly connected with the State'.

French by a French prisoner-of-war in German hands, Thomas-Chevallier, *La Protection Légale de la Race* (1942, Presses Universitaire de France, pp. 67 ff).

[79] Satzung der NSDAP of May 22, 1926, see s. 3. This is reprinted in Haidn-Fischer, *Das Recht der NSDAP*, 3rd ed. (1938), p. 42 ff.

[80] Law against the Formation of New Parties of July 14, 1933 (*Reichsgesetzblatt* I, p. 479).

[81] *Reichsgesetzblatt* I, p. 1016.

The true meaning of this verbiage was not only that there was no State supervision of the party, but also that the State was intended to be merely the executive organ of the wishes of the party. A person excluded by law from participation in forming that will cannot be said to have enjoyed full citizenship rights, all the more as such persons were precluded by law from all appointments to public service, including communal offices, posts in the civil service and in public corporations, such as universities, the railways, the Reichsbank, etc.[82]

I may add that there appear to me important reasons for interpreting the Brussels Rules in a broad, rather than in a narrow way. It is significant that a number of Member States have apparently not felt restrained by these Rules from releasing to the former owners assets in circumstances, which at the first glance would not appear to be covered by the Rules. Thus, under the law of the U.S.A. a return of property under the control of the Alien Property Custodian may be made to any individual who, as a consequence of any law, decree or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941, and the time when such law, decree or regulation was abrogated enjoyed full rights of citizenship under the law of such nation.[83] It is a further requirement that such return is in the interest of the United States, but the United States authorities have shown a remarkable generosity in interpreting this clause. Belgian law goes even further. It excludes from measures of sequestration the assets of enemy nationals who have been treated as enemies by the Hitler régime, provided that their conduct towards Belgium has been beyond reproach. Any party claiming to comply with the requirements of this section has, if the administration refuses to satisfy his or her demands, recourse to the ordinary courts of the country.[84]

Such a broad interpretation will be required especially in connection with the requirement according to which the deprivation

[82] For a reliable survey in tabular form of the disabilities of persons of half- or quarter- Jewish descent see Thomas-Chevallier, *l.c.*, p. 172.

[83] See the Amendment introduced by Public Law 671, of August 1946. Domke, *Control of Alien Property*, Vol. 2 (1947), p. 226. The Department of State and the Department of Justice of the U.S.A. have also issued a joint instruction according to which any property seized by the Reich which was formerly owned by victims of oppression and has been taken under custodian control in the U.S.A. is to be released to the original owner, see Hamburger, 'Behandlung feind ichen Eirgentums is das U.S.A.' in *Juristische Rundschau*, 1949, p. 113 f.

[84] Arrêté-loi of January 13, 1947. I am indebted for this reference to Maitre Ansiaux of the Belgian Bar.

of liberty must have been due to discriminatory regulations. Needless to say, persons who were arrested and detained by the Gestapo and its helpers were not always supplied either with the reasons for their arrest and detention or with the true reasons. In order to prevent unnecessary hardships one must in interpreting this clause not only visualise the situation in a country which in the field of political decisions had admittedly [85] become lawless, but where all sorts of subterfuges were applied in order to cover up this lawlessness to the best of the abilities of an efficient bureaucracy. Where a person was arrested during the period of the war and where the person in question did not enjoy full rights of citizenship, there would seem to be a prima facie case for assuming that the arrest was in fact due to discriminatory regulations and no further evidence should be required to prove that there was a chain of causation between arrest and discrimination. After all, the individual was, in this case, the mere object of the will of the Nazi authorities. He knew the result and not its cause. To impose upon him the burden of proving something which by the nature of things he cannot either know or prove, would hardly be in the spirit in which—one must assume—the framers of the Brussels Rules conceived the exemption.

As in the case of persons of former British nationality or of dual nationality it is a further requirement that the case merits favourable consideration. To this is added that the person in question must not have acted against the Allied cause during the war. This, too, will require a somewhat benevolent interpretation. In times of total war no inhabitant of a country can possibly completely escape the necessity of co-operating in some manner with the war effort of the country in which he lives. The human wrecks who in the concentration camps had to spend the last few weeks or days of their lives in work in quarries and mines, too, contributed to the war effort of Germany. There is only a gradual difference between them and others who were called up to serve in the Organisation Todt or even in the armed forces before being discovered to be of 'mixed blood' or of Jewish origin and sent to perish in the gas chambers of Auschwitz. 'Acting against the Allied cause' will therefore have to exclude any acts which the individual living in Germany at the time in question and under the circumstances then prevailing in Germany—where the lives of non-collaborators with the régime and in the war effort were exceedingly cheap—could not fairly be expected to refrain from committing.

It is a matter of history that the values for which the Allies

[85] See the significant work by H. P. Ipsen, *Politik and Justiz* (1938).

stood in the Second World War have had not only sympathisers, but even martyrs among those who were in law enemy nationals on enemy territory. The ways in which these martyrs had to suffer differed so very greatly that it is probably impossible to devise a formula which covers them all. The one which was adopted by the Assembly of the Inter-Allied Reparations Agency cannot claim to be the ideal solution. Its inevitable shortcomings may easily create feelings of bitterness and disappointment. Only a generous —perhaps even an over-generous—interpretation and administration will be worthy of those paramount values for whose maintenance this war was waged.

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THE INTERNATIONAL COURT'S ADVISORY OPINION ON THE INTERNATIONAL STATUS OF SOUTH-WEST AFRICA [1]

Polonius: What do you read, my lord?
Hamlet: Word, words, words.

The Background

This has been said [2] to be the most important Advisory Opinion given since the Permanent Court of International Justice (by the remarkable division of eight to seven) pronounced against the legality of the proposed customs régime between Germany and Austria in 1931.

For a proper understanding of the issue and of the opinion of the Court, it is necessary to go back to the constitution of the original mandate for South-West Africa, and to trace briefly the course of events which lead to the decision of the General Assembly of the United Nations to seek the opinion of the International Court.[4]

By Article 119 of the Treaty of Versailles Germany 'renounced all her rights and titles over her overseas possessions' in favour of the Principal Allied and Associated Powers. These powers, and not the League of Nations, allocated the mandated possessions to the mandatories. South-West Africa was assigned to the Union of South Africa. The League, however, 'by a series of legal instruments, specified the degree of authority, supervision or administration to be exercised by the selected mandatories'.[5] Article 22 of the Covenant of the League, dealing with the mandates system, distinguished three types of mandate, which came to be known as the A, B and C mandates. South-West Africa was specially mentioned as an example of the C type, which, ran Article 22,

[1] I.C.J. Reports, 1950, p. 128.
[2] By J. F. L. van Essen, 'Zuid-West Afrika voor het Internationale Hof van Justitie', 13 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1950), 187.
[4] On the origin of the Mandates System, see inter alia: Quincy Wright, *Mandates Under the League of Nations* (1930), Ch. II; van Maanen-Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (1929), Ch. II; Wessels, *Die Mandaat vir Suidwes Afrika* (1938), Ch. 1; Hales, 'The Creation and Application of the Mandate System', 25 *Transactions of the Grotius Society* (1939), 185; Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948), Part II.
[5] *The Mandates System: Origin—Principle, Application*, League of Nations, 1945, VI, A.1, p. 19.

'can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population'.

The safeguards referred to included freedom of conscience and religion, the prohibition of the slave trade and the arms and liquor traffic, and the prevention of the establishment of fortifications or military or naval bases and of military training of the natives other than for police and defence purposes.

Article 22 also provided that the mandatory must render an annual report to the Council of the League and that a Permanent Mandates Commission would be constituted to receive such reports and advise the Council. The degree of authority, control and administration was to be explicitly defined in each case by the Council. Accordingly, the terms of the mandate for South-West Africa were fixed on December 17, 1920. They repeated the material parts of Article 22 of the Covenant, provided that the consent of the Council was required for any modification, and that any dispute between the Union and another member of the League, relating to the interpretation or application of the mandate, would, if it could not be settled by negotiation, be submitted to the Permanent Court. The right of petition by the inhabitants of the mandated territories was not contained in any of the original instruments, but was created later by a decision of the Council on January 31, 1923, which was voluntarily accepted by the mandatories.

South Africa exercised a very close control internally and externally over South-West Africa. Indeed, some steps she took were criticised by the Permanent Mandates Commission, in particular her use of the term 'possess sovereignty' in the preamble to the Angola Boundary Treaty, 1926.[6]

During the Second World War the League and its agencies were paralysed. At the end of the war the position of the mandates came up for consideration once more. At the San Francisco Conference the Union reserved her position in relation to South-West Africa. The Union became a member of the United Nations, the Charter of which came into force on October 24, 1945. Chapters XI and XII of the Charter, and in particular Articles 73, 74, 75, 77, 79 and 80 in these Chapters, are of such importance in the determination of the juridical status of South-West Africa, and are referred to so often in the Court's Opinion, that they are best set out *in extenso* in so far as they are relevant :

[6] See Wright, 424 ff.; Gey van Pittius, 'Whither South-West Africa', 23 *International Affairs* (1947), 203.

Chapter XI

Declaration Regarding Non-Self-Governing Territories

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end :

. . . . . .

e. to transmit regularly to the Secretary-General for information purposes . . . statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

Chapter XII

International Trusteeship System

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements . . . .

. . . . . .

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements :

(a) territories now held under mandate;
(b) territories which may be detached from enemy states as a result of the Second World War; and
(c) territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the aforegoing categories will be brought under the trusteeship system and upon what terms.

. . . . . .

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a member of the United Nations and shall be approved [by the Security Council, as regards strategic areas and by the General Assembly in other cases].

Article 80

1. Except as may be agreed upon in individual trusteeship agreements . . . and until such agreements have been included, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any state or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.
2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

. . . . . .

CHAPTER XIII

THE TRUSTEESHIP COUNCIL

. . . . . .

From the beginning the Union sought the approval of the United Nations for incorporation of South-West Africa into South Africa.[7]

[7] For an account of the South-West Africa question before the United Nations, see Duncan Hall, 24 B.Y.I.L. (1947), 385; Oppenheim, *International Law*, Vol. 1, 7th ed. (1948), 205, n. 3; Wright, 23 *International Affairs* (1947), 209; Kelsen, *The Law of the United Nations* (1950), 572, 595 ff.; *Year Book of the*

Before the Fourth Committee of the First Part of the First Session of the General Assembly, on January 22, 1946, the Union representative stated that after the will of the European and native population of the Territory had been consulted 'the decision of the Union [in respect of the conclusion of a trusteeship agreement] would be submitted to the General Assembly for judgment'. At the Fourth Committee the Union delegate declared that South Africa was not, in virtue of the Charter, obliged to place South-West Africa under the trusteeship system.

Between the first and second parts of the First General Assembly, the League of Nations went into liquidation. Before the Assembly of the League on April 9, 1946, the Union representative said that his government intended to formulate its case before the next session of the General Assembly, for the international recognition of South-West Africa as an integral part of the Union. The vitally important 'winding-up' resolution of the League of April 18, 1946, states that the Assembly:

> '3. Recognises that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;
>
> 4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective Mandatory Powers.'

The General Assembly returned to the question of South-West Africa in the Second Part of its First Session. The Union submitted a proposal for approval of incorporation of South-West Africa which, after long debate, was rejected by the General Assembly on December 14, 1946. The Assembly recommended 'that the mandated territory of South-West Africa be placed under the international trusteeship system' and invited the Union Government to put forward a draft trusteeship agreement.[8]

This the Union Government declined to do, but it declared at the Second Session of the General Assembly in September,

United Nations, 1946–7, 205–8, and *1947–8*, 142–7; Union White Papers on the Discussions and Proceedings in the United Nations, Dec., 1947, to Dec., 1948, and Dec., 1948, to Dec., 1949.

[8] U.N. Doc. A/64/Add. 1.

1947, that it would not proceed with incorporation, would maintain the *status quo* and continue to administer the territory in the spirit of the mandate. At the Fourth Committee of this session the South African representative stated that the Union would submit an annual report containing the information set out in Article 73 e, on the assumption that the report would not be considered by the Trusteeship Council, and would not be dealt with as if a trusteeship agreement had been concluded. The right to submit petitions, the Union claimed, could no longer be exercised, since the League of Nations had disappeared. The Fourth Committee reaffirmed its previous recommendation that South-West Africa be placed under the trusteeship system.[9] The Second General Assembly on November 1, 1947, in a rather milder resolution, urged that the Union Government submit a trusteeship agreement, and expressed 'the hope that the Union Government might find it possible' to submit it in time for discussion at the next session.[10]

Already in the prolonged discussion of the Fourth Committee of the Second General Assembly it had been suggested by several delegations that the International Court be asked its opinion in an advisory capacity on whether or not the Union was under a legal obligation to submit a trusteeship agreement; but no steps were taken to implement the suggestion.

The Third Session of the General Assembly, commencing in September, 1948, found the game of battledore and shuttlecock continuing. The Union regretted that it was unable to comply with the request of the General Assembly made at the last session, said Mr. Eric Louw, leader of the Union delegation, before the Fourth (Trusteeship) Committee on November 9. That Committee, however, affirmed its two previous recommendations, and noted with regret that they had not been carried out. The General Assembly adopted the resolution of the Fourth Committee on November 26.[11]

The next move was by the Union Government, which gave notice in July, 1949, that it had decided 'in the interests of efficient administration', to discontinue the submission of reports on South-West Africa.[12] This step, and the passing of the South-West Africa Affairs Amendment Act by the Union Parliament,[13] prompted a consideration of the 'South-West Africa question' at the Fourth Session of the General Assembly. Both the Fourth (Trusteeship) Committee and the General Assembly in plenary

[9] U.N. Doc. A/422.
[10] U.N. Doc. A/519.
[11] U.N. Doc. A/810.
[12] Text in Union White Paper, 1948–9.
[13] Act No. 23 of 1949.

session passed a resolution regretting the withdrawal of reports; reiterating their previous resolutions that the Union put forward a draft trusteeship agreement, and inviting the Union to do so and resume submission of reports.[14] The more important resolution was to ask the International Court for its advisory opinion on the international status of South-West Africa. The material part of the resolution as finally adopted on December 6, 1949, by the General Assembly in plenary session, runs as follows :

> ' What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular :
>
> (*a*) Does the Union of South Africa continue to have international obligations under the mandate for South-West Africa and, if so, what are those obligations ?
>
> (*b*) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the territory of South-West Africa ?
>
> (*c*) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory ?'

The Views of the Writers and the Union Government

Before setting out and analysing the conclusions of the judges of the International Court, it might be of interest to show the diversity of opinion amongst the leading writers, and the attitude of the Union Government. The views swing from pole to pole—from placing the United Nations as far as possible in the stead of the League, asserting that the mandate continues and that the Union is obliged to place South-West Africa under trusteeship, to holding that the mandate is ended and the Union is under no obligation whatsoever to the United Nations and may incorporate South-West Africa.

The one extreme may be exemplified by Quincy Wright, who made out a case for ' the theory that the League of Nations was sovereign [15] of the areas and on its demise the United Nations as its *de facto* successor was competent to dispose of these rights '.[16]

Intermediate positions were adopted by Brierly and Duncan Hall. Brierly says [17] :

[14] U.N. Doc. A/1251.
[15] The question of sovereignty over C mandates is discussed below.
[16] 62 Harvard Law Review (1948–9), 1425.
[17] *The Law of Nations*, 4th ed. (1949), 155, n. 1.

> 'Under its mandate for [the] territory the Union of South Africa has hitherto administered it as "an integral portion" of its own territory, and in those circumstances its annexation, which the Union now desires to carry out, would be little more than a formal change. The General Assembly, however, has called upon the Union to submit a trust agreement for the territory, but there is nothing in the Charter which compels the Union to do this, nor can the General Assembly compel it to do so. The present position is therefore that the mandate continues, but as the only responsibility of the mandatory is to the League of Nations, which is defunct, it is for practical purposes at an end.'

Duncan Hall, too, was of opinion that there was no obligation on the Union to submit to a trusteeship agreement. In his view sovereignty vests in the mandatory, South Africa, subject to 'the servitude imposed by Article 22 of the Covenant and the text of the Mandate'.[18]

The other extreme view is expressed by Kelsen and the Union Government. In his latest work, *The Law of the United Nations*, which appeared while the International Court was still engaged in its deliberations, Kelsen, applying his own notions of interpretation of written instruments, and his concept of 'pure legal science', reaches conclusions almost identical with those put forward by the Union Government when presenting its case before the General Assembly[19] and later the International Court.[20] According to Kelsen there is no competency in the United Nations to place mandated territories under the trusteeship system; this would have required a valid agreement between the United Nations and the League, but no such agreement was concluded, or, indeed, could have been concluded in conformity with the Covenant of the League. The consent of the mandatory is necessary for placing 'mandated' territories under trusteeship. The mandates came to an end with the demise of the League, for the latter's existence was essential to the continuance of the mandate agreement, to which it was a contracting party. Thus while the Union is under the obligation it has voluntarily assumed under Articles 73 and 74 of the Charter, South-West Africa no longer has the status of a mandated territory. Kelsen is prepared to say that extension by the Union of its sovereignty over South-West Africa, amounting to annexation, is

[18] *Mandates, Dependencies and Trusteeship*, 274.
[19] See, *e.g.*, the opening speech of Mr. Eric Louw before the Fourth (Trusteeship) Committee of the Third Session of the General Assembly on November 9, 1948. (Full text in Union White Paper, 1947–8, 16–19.)
[20] See van Essen, *op. cit.*, *passim*.

certainly possible without any violation of the Covenant—which has ceased to be in force—or of the Charter.[21]

The attitude of the Union Government is that its past submission of reports was not an acknowledgement of accountability to the United Nations. It is under no legal or moral obligation to place South-West Africa under trusteeship and retains its powers of control and administration over South-West Africa as an integral part of the Union. The territory must not be taken to have been incorporated into the Union, or to be in the position of a fifth province. Nevertheless the mandate is at an end, and sovereignty is vested in the Union.[22] As to the present juridical status of South-West Africa, all that can be said is that it is *sui generis*.

THE OPINION OF THE INTERNATIONAL COURT [23]

On the general question as to the international status of South-West Africa, the Opinion was unanimous

> 'that South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920'.[24]

Question (a).

On question (*a*), there was a division of opinion. By a majority of twelve to two (Judges Sir Arnold McNair and Read), the court found

> 'that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa

[21] *The Law of the United Nations* (1950), 571, 575, 596 ff.

[22] These views were put forward by Dr. D. F. Malan, Prime Minister of the Union, in the course of the debate on South-West Africa Affairs Amendment Bill. See *Senate Debates*, April 5, 1949, cols. 1277–8, 1286; *House of Assembly Debates*, February 16, 1949, col. 1172. See also the statements of the Minister of the Interior, Dr. T. E. Dönges, *House of Assembly Debates*, February 21, 1949, cols. 1476 ff. The Prime Minister has stated that the mandate is at an end (*House of Assembly Debates*, March 30, 1949, col. 3022); but on other occasions has remarked that if one still desired to use the term 'mandate' then South-West Africa 'has become jointly with the Union the mandatory over itself' (*House of Assembly Debates*, February 16, 1949, col. 1172; *Senate Debates*, April 5, 1949, cols. 1273–4). It is difficult to follow the meaning of these statements. It is interesting to observe that all reference to the establishment of the mandate for South-West Africa made in the preamble to the South-West Africa Constitution Act, 1925, has been removed by the South-West Africa Affairs Amendment Act, 1949; so, too, the word 'mandated' in the phrase 'mandated territory of South-West Africa' in the long title of the 1925 Act. The Union Government apparently is guarding itself against a plea of estoppel, waiver or admission.

[23] President Basdevant (France); Vice-President Guerrero (El Salvador); Judges Alvarez (Chile), Hackworth (U.S.A.), Winiarski (Poland), Zoričić (Yugoslavia), de Visscher (Belgium), Sir Arnold McNair (U.K.), Klaestad (Norway), Badawi Pasha (Egypt), Krylov (U.S.S.R.), Read (Canada), Hsu Mo (China), Azevedo (Brazil).

[24] I.C.J. Reports, 1950, p. 143.

as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court.' [25]

Judges Sir Arnold McNair and Read could not agree with the majority as to accountability and report to, and supervision by, the United Nations, and the right of petition. These rights and obligations, they considered, were at an end. They agreed with the majority finding [26] in other respects, including the compulsory jurisdiction of the International Court in the place of the former Permanent Court of International Justice. Judge Alvarez in his so-called dissenting opinion, whilst concurring with the majority finding, in passing made certain remarks which go even farther than the majority were prepared to.

The answer to Question (*a*) may thus be analysed in two parts : firstly, that part agreed to by all members of the court, Judges Sir Arnold McNair and Read giving separate reasons; and secondly, that part in which the latter two judges, and to some extent Judge Alvarez, come to different conclusions from the majority.

That part of the answer to Question (*a*) *on which the opinion was unanimous*

The Main Opinion [27] holds that the mandate continues, and the submission of the Union Government, that it has lapsed with the demise of the mandator, is rejected. This submission, runs the Opinion, arises out of confusion resulting from analogies drawn from the concept of mandate in certain ' national ' laws; but no such analogy should be drawn. The mandate was created as an international institution with the object of a sacred trust of civilisation, and the rules regulating the mandate constituted an international status for the territory. If the Union Government's contention were correct, it means that that Government's authority, derived from the mandate, must also have lapsed.

The obligations of the Union under Article 22 of the Covenant and Articles 2 and 5 of the mandate, the Opinion states, represent

[25] P. 143.
[26] That is, the opinion of the court as a whole. There are ' separate opinions ' by Judges Sir Arnold McNair and Read, and ' dissenting opinions ' by Judges Alvarez, de Visscher and Krylov. The distinction between a ' separate ' and a ' dissenting ' opinion is not always apparent.
[27] Pp. 131–8.

the very essence of this sacred trust, and their existence is independent of that of the League. Article 80 (1) of the Charter is used as a support for this conclusion, but, as Sir Arnold McNair points out, this Article merely says that nothing in Chapter XII of the Charter shall be construed to alter rights under existing international instruments, and it is difficult to see its relevance. The Main Opinion refers to the dissolution resolution of the League Assembly of April 18, 1946, by which the Assembly ' manifested its understanding that the Mandates were to continue in existence until " other arrangements " were established '. It goes on to state that on divers occasions the Union Government has expressed a similar view, but with respect it is submitted that it is impossible to draw a clear inference from the statements of the Union Government that it recognised that legally its obligations under the mandate continued. This, however, is of little moment, as the court did not rely on the statement made by South African representatives as more than buttressing the conclusion the court had already reached.

Finding that the mandate continues, the Main Opinion comes to the conclusion that the degree of supervision to be exercised by the General Assembly should not exceed that applied under the mandates system, and should conform as far as possible, and especially in respect of reports and submissions, to the procedure followed by the League Council. It is not clear, however, what the majority view is on the jurisdiction of the International Court, which all agree has been vested by Article 37 of its Charter with the former compulsory jurisdiction of the Permanent Court in matters of dispute between the mandatory and another member of the League. Is it only in respect of former members of the League that this jurisdiction exists (as Sir Arnold McNair contends), or any member of the United Nations, even though it was not a member of the League?

Certain of Sir Arnold McNair's views have already been touched on, but it would be best to look at his valuable opinion [28] as a whole. In rejecting the Union's contention that the demise of the League put an end to the mandate, he subjects the term ' mandate ', newly applied in international law after World War I, to a very close analysis. When ' confronted with a new legal institution ', says Sir Arnold in a noteworthy passage, ' the duty of international tribunals . . . is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these

[28] Pp. 146–163, and in this connection especially pp. 146–158.

rules and institutions '.[29] Applying this test to the Mandate, he cites with approval Brierly's thesis [30] and certain passages from the South African case of *R.* v. *Christian* [31] and the Australian case of *Ffrost* v. *Stevenson*,[32] that the governing principle of the mandates system is to be found in the trust, not in mandate or agency.

Sir Arnold's second ground for finding that the mandates system still exists, is that it was a case of creation ' by a multipartite treaty [of] some new international regime or status, which soon acquires a degree of acceptance beyond the limits of the actual contracting parties, and giving it an objective existence '.[33] The difficulty produced by the dissolution of the League is only the ' mechanical ' one that the obligations of the mandatory to the League itself have ended; but the obligations owed to the members of the League at the time of its dissolution subsist, save those which in their performance would require the League's co-operation.

The third ground advanced by Sir Arnold is that the mandate created two types of rights and duties: personal rights and obligations, arising out of a contractual obligation of the mandatory to furnish reports, obtain consent of the League Council for modification of the mandate and to submit disputes to the Permanent Court; and real rights and obligations arising from the transfer to the mandatory, on specified terms, of certain rights of possession and government of South-West Africa, valid against the world. The dissolution of the League put an end to the personal, but not the real rights, which provided that element of permanence which gave South-West Africa a status independent of the existence of the League. There is a difficulty in the way of acceptance of this ingenious analysis, however : can one conceive of the Union as a trustee in respect of South-West Africa and at the same time vested with rights yielding beneficial enjoyment over her?

Judge Read in his Separate Opinion [34] also concludes that the legal rights and interests, under the mandate, of the members of the League, including those not members of the United Nations, continue. Only action by the League itself, or consent of its members, could have ended them, and this did not occur.

That part of the answer to Question (a) on which opinion was divided

All the members of the court, save Sir Arnold McNair and Judge Read, hold that the ' secondary ' or ' auxiliary ' obligations of the

[29] At 148.
[30] 16 B.Y.I.L. (1929), 217–9.
[31] [1924] A.D. 101 at 121 and 136.
[32] 58 Commonwealth L.R. (1937), 528; *Annual Digest, 1935–7*, Case No. 29.
[33] P. 153.
[34] Pp. 164–173.

mandatory—report, accountability, supervision and petition—continue. This finding is of very considerable importance. These obligations afford the main practical means of bringing the mandatory's actions before the judgment of other nations. Judge Read stresses the value of the compulsory jurisdiction of the International Council and the powers of the General Assembly under Article 10 (the ' discussion clause ' of the Charter), but it may well be doubted whether in practice they would prove an effective means of controlling the mandatory. On the other hand, should the General Assembly accept the majority decision, against the clear wishes of the Union Government but in accordance with past practice, a serious deterioration in the relationship of the Union with the United Nations may be expected.

The difference in the views of the members of the court rests fundamentally on a difference in approach to the construction of the relevant international instruments. Judges Sir Arnold McNair and Read construe them more strictly than the other judges.

The foundation of the majority Opinion [35] is that the performance of these duties is necessary for the efficient performance of ' the sacred trust of civilisation '. Therefore, despite the fact that the League's supervisory functions were not expressly transferred to or assumed by that body, the obligation of the Union to submit to international supervision remains. The obligation is owed to the United Nations, which, through the Trusteeship Council, has an organ performing similar functions to the now defunct Permanent Mandates Commission. The comment might be made that the composition of the bodies is very different, particularly in that the Mandates Commission was ' non-political ' while the Trusteeship Council is representative of governments. Three grounds are adduced in the Main Opinion for finding that the United Nations is legally qualified to exercise the supervisory functions. Firstly, the purpose of Article 80 is to provide proper protection for the rights of the inhabitants of mandated territories until trusteeship agreements have been concluded, which requires international supervision. Secondly, Article 10 grants this competence, for it empowers the General Assembly to discuss any matter within the scope of the Charter. Thirdly, the League's winding-up resolution ' presupposes that the supervisory functions exercised by the League would be taken over by the United Nations '.

The majority find, too, that the right of petition is maintained by Article 80 (1) of the Charter, and that the examination of petitions is part of the supervisory functions of the United Nations.

[35] Pp. 136–8.

It is submitted that the finding of the majority is untenable, and that the views of Judges Sir Arnold McNair [36] and Read [37] are to be preferred. They arrive at the same result for much the same reasons, and it is proposed to look only at the judgment of the former. He rejects the contention that the United Nations succeeded to the supervisory rights and functions of the League, as 'pure inference'. Sir Arnold, indeed, finds that there is a significant omission in the Charter which points in the other direction—the omission to provide for the succession of the United Nations in this regard, although in the case of the International Court its succession was expressly provided for in its Charter, and although at the San Francisco Conference, when the Charter of the United Nations was being drafted, the Union Government gave public notice that it would claim that South-West Africa be incorporated in the Union. It has already been shown that Sir Arnold rejected the reference to Article 80 (1) on the ground that it was irrelevant. Nor can he find in the statements of the Union Government 'adequate evidence that [she] has either assented to an implied sucession by the United Nations to the administrative supervision [formerly] exercised by the League . . . or has entered into a new obligation towards the United Nations to revive the pre-war system of supervision'. The dissolution resolution of the League, he says, cannot be interpreted as imposing a legal obligation on the Union to make annual reports to the United Nations. The General Assembly, Sir Arnold agrees, can discuss the South-West Africa mandate and make recommendations under Article 10 (the so-called 'discussion clause' of the Charter), but this rests on the terms of the Charter itself and not on any theory of implied succession. (It might be added that the reasoning of the majority that Article 10 grants competency to the United Nations to exercise the supervisory functions, is a *petitio principii*.)

There remains to consider Judge Alvarez' Dissenting Opinion. It has already been pointed out that it suffers from an internal antinomy. Judge Alvarez' final conclusion on Question (*a*) [38] is the same as that expressed in the Main Opinion, *i.e.*, that the Union has the same international obligations which she had under the mandate and Article 22 of the Covenant. Within the body of his Opinion, however, he goes much further, stating that the Union's duty of report on, and the United Nations' control and supervision over, South-West Africa extend beyond the mandate to Articles 87 and 88 of the Charter. These Articles give the

[36] At 159–162.
[37] At 166–173.
[38] Pp. 184–5.

General Assembly and Trusteeship Council authority to consider reports, accept petitions, provide for visits to trust territories, and require the Trusteeship Council to formulate a questionnaire which must be answered by the administering authority. Obviously in so stating M. Alvarez travels beyond the Main Opinion which provides that 'the degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations'.[39]

With all due respect to so eminent a jurist as M. Alvarez, it is not surprising that inconsistencies appear in his Opinion, when regard be had to his unorthodox approach to problems of international law. The very commencement of his Opinion, in which he states that the questions propounded for decision are 'of great importance not only from the point of view of international law, but also from the social, economic and international political points of view',[40] gives the reader cause for belief that unusual views are to be expounded; nor is he disappointed, for he is at once thrust into a dissertation on the 'new international law'. It is best to let the learned judge's words speak for themselves. The mandate and trusteeship systems exemplify, he says, this 'new international law', which has arisen from the transformation of the community of states, hitherto anarchical, into an organised international society. 'It rests on the basic reconstruction of fundamental principles of classical international law, and brings them into harmony with the new conditions of the life of peoples; finally, it is based on the new social régime which has appeared, *the régime of interdependence*, which is taking the place of the individualistic régime. . . . This new régime has given rise to what may be called *social interdependence* which is taking the place of traditional *individualism*.'[41]

The new international law, says Judge Alvarez, has as its object international social justice, and thus must lay stress on the obligations of states towards the international community, requiring the limitation of the absolute international sovereignty of states. The obligations are not only legal obligations, but also moral obligations and obligations of a political international character. This new law is in the course of formation and it is for the International Court and the jurists to develop it. The exact function of the court does not appear clear :

[39] P. 138.
[40] P. 174.
[41] P. 175.

> ' . . . it may be said that the court *creates* the law; it creates it by modifying classical law; in fact it merely *declares* what is the law today '.

With the aid of what rules of construction does M. Alvarez propose to create, or if you will, expound the new international law? In a passage with which the majority of international lawyers may not agree, he condemns the ' traditional line ' of interpretation of texts, the ' juridical technique ' of searching for the ' strictly literal sense of the text ', with the aid of *travaux préparatoires* and the postulates, axioms and precepts of ' general law ' (especially Roman law, and even natural law), and of classical international law.

> ' Extreme logic, dialectics and exclusively juridical technique must also be banished. Reality, the requirements of the life of nations, the common interest, social justice, must never be forgotten.' [43]

Certainly the common reproach could not be levelled that law lags behind social and political needs and realities, were M. Alvarez' views to be generally adopted.[44] But it is believed that their application would eliminiate the disease by killing off the patient. For their underlying assumption surely is that it is not possible to distinguish a legal from a purely moral or social or political obligation. If this be so, what need for international *law*? In an address delivered some years ago, Sir Arnold McNair put into express terms his criticism of the school to which M. Alvarez belongs, a criticism which is implicit in his Separate Opinion. ' The sphere of operation of Public International Law ', he said, ' is the legal relations between states, not their political or economic or moral relations, just as English law regulates our legal relations, and not our social relations, such as a dinner engagement, or our moral relations, such as the duty of charity or of being a good neighbour '.[45]

Question (b).

> The opinion of the judges was unanimous ' that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System '.[46]

[43] P. 178.
[44] He expounds similar views in an article entitled ' The Reconstruction and Codification of International Law ', 1 I.L.Q. (1947), 469.
[45] 1 I.L.Q. (1947), 4.
[46] P. 144.

Whether the Union is under a legal obligation to place South-West Africa under the trusteeship system, however, promoted the sharpest of the division of views of the court. Eight [47] held she was not. Of the other six members of the court, five [48] were of the opinion that the Union was under a legal obligation ' to enter into negotiations with a view to concluding a Trusteeship Agreement ' [49]; Judge Alvarez went somewhat further than the other minority judges, and his views will be analysed later.

The reasoning in the Main Opinion [50] is simple and in accordance with the view expressed by the preponderance of legal opinion in the past. Articles 75 and 77 are both permissive in character. The fact that Article 77 (1) paragraph (c) used the word ' voluntarily ' (' territories voluntarily placed under the [trusteeship] system '), whereas the word was not used in paragraph (a) (' territories now held under mandate ') or paragraph (b) (' territories which may be detached from enemy states ') does not go to show that there is a legal obligation to place territories falling under the latter two categories under the trusteeship system. The word ' voluntarily ' was used *ex abundanti cautela*. Article 80 (2) is entirely negative in character, and had it been intended to impose a duty on mandatories to negotiate and conclude trusteeship agreements it would have been couched in positive terms. Nor could that Article have been intended to create an obligation on mandatories to ' enter into negotiations with a view to concluding a trusteeship agreement ', for it refers also to territories covered by Article 77 (1) (b) and (c), in respect of which there obviously could be no such intention.

It is true, runs the Main Opinion, that the Charter contemplated and made provision for only one system, the trusteeship system; and that it was anticipated that mandatories would conclude trusteeship agreement. But, it goes on to say, it is not possible to conclude from this that there is a legal obligation on mandatories to do so.

There are three minority Opinions on this issue. Judge de Visscher's Opinion is concurred in by Vice-President Guerrero and Judges Zoričić and Badawi Pasha. Judges Alvarez and Krylov wrote separate dissenting Opinions.

Judge de Visscher [51] concedes that the provisions of Chapter XII of the Charter (' International Trusteeship System ') ' do not

[47] President Basdevant, Judges Hackworth, Winiarski, Sir Arnold McNair, Klaestad, Read, Hsu Mo and Azevedo.
[48] Vice-President Guerrero, Judges Zoričić, de Visscher, Badawi Pasha, Krylov.
[49] See pp. 144–5, 186 ff., 191–2.
[50] Pp. 138–140.
[51] See pp. 186–190.

impose on the Union of South Africa a legal obligation to conclude a Trusteeship Agreement, in the sense that the Union is free to accept or to refuse the particular terms of a draft agreement '. But he does consider that that Chapter imposes on the Union ' an obligation to take part in negotiations with a view to concluding an agreement '. This conclusion (the practical effect of which the present writer does not profess to understand) is reached by the learned judge from a consideration of the relevant Articles of the Charter from the viewpoint that, as far as possible, they ought to be interpreted as imposing an obligation on the mandatory to conclude a trusteeship agreement, for to hold otherwise would be to allow the perpetual existence of the mandates system, not governed by the Charter and inconsistent with the objects of Chapter XII. Since by the clear wording of Articles 75, 77 and 79 the mandatory is not compelled to accept the terms of a proposed agreement, Judge de Visscher is constrained to conclude that there is a lesser legal obligation, ' to be ready to take part in negotiations ' and to conduct them ' in good faith with a view to concluding an agreement '. He says that his conclusion is fortified by the use of the word ' voluntarily ' in Article 77 (1) paragraph (c) only, and not in paragraphs (a) and (b), referring to mandated territories and territories detached from enemy states. It is only in respect of territories falling under paragraph (c) that there is no obligation to enter into negotiations with a view to concluding a trusteeship agreement. But Judge de Visscher makes no effort to answer the point of the majority that Article 80 (2) refers to territories mentioned in this paragraph (c). This is the fundamental weakness of his analysis, and, it is believed, warrants the rejection of his conclusion.[52]

Judge Alvarez is more explicit in his decision on the legal duty of the Union, for he finds that not only is it under a duty to negotiate a trusteeship agreement, but also to conclude it.[53] He derives this conclusion ' from the spirit of the Charter, which leaves no place for the future co-existence of the Mandates System and the Trusteeship System '. But then follows a passage in his Opinion which bears out the criticism already made of his general approach :

> ' Even admitting that there is no legal obligation to conclude an agreement, there is, at least, a political obligation, a duty which derives from social inter-dependence and which can be sanctioned by the Assembly of the U.N.' [54]

[52] And also that of Judge Krylov, who, in a very short dissenting opinion (pp. 191–2) comes to the same conclusion for much the same reasons.

[53] P. 183.

[54] P. 184.

What would take place if no agreement could be reached, is not clear from M. Alvarez' Opinion. In the course of his analysis of the issue, he says: 'It then becomes necessary to refer to arbitration. . . . One would then have to seek an amicable solution, or to submit the case to the International Court of Justice'.[55]
In his final answers to the questions propounded, he says in one passage that the case must be referred to arbitration, and in another that 'the United Nations must then take the appropriate measures which it is empowered to take under Article 10 of the Charter'.

Question (c).

> The Court was of the unanimous opinion[56] 'that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations'.

Two grounds are given for this conclusion:
(*a*) the powers of supervision over mandates are now vested in the General Assembly of the United Nations (answer to Question (*a*)); (*b*) the power to substitute the trusteeship system for the mandates system is vested in the General Assembly by its approving of a proposed trusteeship agreement; and it also has power to approve amendment of such agreement.[57]

> 'By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under mandate which would not have for its purpose the placing of the territory under the Trusteeship System.'[58]

The court considered that its conclusion was strengthened, firstly by the attitude of the Union Government, which has recognised the competence of the General Assembly in the matter[59]; and secondly, by the affirmation by the General Assembly of its competence in the matter, through its resolution of December 14, 1946.[60] It may be doubted, however, if either of these facts affords any support in *law* for the court's conclusion.

It is submitted that the reasoning of Sir Arnold McNair[61] is to be preferred to that in the Main Opinion. He points out that the first paragraph of Article 7 of the Mandate, by which the

[55] P. 184.
[56] P. 144.
[57] Articles 79 and 85 of the Charter.
[58] P. 142.
[59] See above, text to and following n. 7.
[60] See above, text to n. 8.
[61] Pp. 162–3.

consent of the League Council was required for any modification of the mandate, has lapsed owing to the disappearance of the League and the Council. The League and its then existing members, through paragraphs (3) and (4) of the winding-up resolution of the League, on April 18, 1946,[62] granted its consent to any future change in the terms of the mandate through agreement between the Union and the United Nations.

Judge Alvarez once again goes further in the body of his Opinion [63] than in his final conclusions.[64] The latter is in the same terms as the Main Opinion. In the course of his analysis, however, he states that if the mandatory does not perform its obligations under the mandate, the General Assembly has the right, under Article 10 of the Charter, to make admonitions, and if necessary, revoke the Charter. It is difficult to see how, even under the dispensation of the new international law, Article 10, the 'discussion clause' of the Charter,[65] can be construed to give this executive power. It is equally difficult to follow the legal basis for, and indeed at times the true meaning of, the other conclusions M. Alvarez arrives at: that the General Assembly may terminate a mandate if the local population is capable of governing itself, despite contrary opinion of the mandatory; that the General Assembly 'may also terminate a mandate for political considerations . . . . In so doing, however, it must not abuse its right'; and finally, that where the mandatory reports that the local population of the mandated territory 'will never be able, for anthropological or other reasons', to attain 'a sufficient degree of civilisation to become capable of self-government', the General Assembly should institute an inquiry, and if the statement be proved true, authorise the mandatory to annex the territory, 'for it cannot remain without a protector or guide' (it might have been thought that this was just the purpose the mandatory was supposed to have served).

Sovereignty

One very interesting question, not yet touched on in this review, was dealt with in passing by the judges of the International Court —the seat of sovereignty in the C Mandates. Quincy Wright in 1930 had discovered 'some fifty juristic discussions' [66] and, as Latham C.J. pointed out in *Ffrost* v. *Stevenson*,[67] there have been

[62] See above, p. 82, for the terms of the resolution.
[63] Pp. 182–3.
[64] P. 185.
[65] See Goodrich and Hambro, *Charter of the United Nations, ad loc.*
[66] *Op. cit.*, 319, n. 18.
[67] *Supra.*

many discussions since. At least eight different views were held.[68] Some writers found that sovereignty resided in the mandatory[69]; others in the mandatory *pro tem*[70]; yet others in the mandatory acting with the consent of the League Council.[71] Another school favoured the view that sovereignty vested in the Principal Allied and Associated Powers.[72] The League of Nations was put forward by other jurists,[73] but was decisively rejected by the Appellate Division of the Union in *R.* v. *Christian.*[74] A variation of the latter thesis was that sovereignty vested in the League but was exercised by the mandatory. Finally, there was the claim that sovereignty resided in the inhabitants of the mandated territory, but was temporarily in suspense.[75] Quite another type of approach was followed by those who considered that nothing was to be gained by trying to apply the concept of sovereignty to the juridical status of a mandated territory, which was something *sui generis.*[76]

Several interesting statements were made by the International Court in the Opinion under review. In the Main Opinion,[77] and also in Judge Read's separate opinion,[78] it is categorically stated that the creation of the mandates system did not involve a transfer of sovereignty to the Union. Sir Arnold McNair states that this system was ' a new species of international government, which does not fit into the old concept of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent State . . . sovereignty will revive and vest in the new State '.[79] Somewhat similar sentiments were expressed by Judge

[68] See, generally, McNair, 3 Cambridge Law Journal (1928), 149; Oppenheim, *op. cit.*, 202 n.; Wright, *op. cit.*, 319 ff.

[69] *E.g.*, Keith, with modifications, *Journal of Comparative Legislation*, 3rd series, Vol. 7 (1925), 279–280; Vol. 10 (1928), 121–2; de Villiers and Wessels, JJ.A., in *R.* v. *Christian* (*supra*).

[70] *E.g.*, Rosenow, 3 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1939), 229 ff.

[71] *E.g.*, McNair, *op. cit.*; Wright, 17 A.J.I.L. (1923), 681 ff.; 18 A.J.I.L. (1924), 306 ff.; 20 A.J.I.L. (1926), 768 ff.

[72] See Wright, 319, n. 20; Hall, 22 *International Affairs* (1946), 205.

[73] See authorities cited in Oppenheim, *loc. cit.*

[74] *Supra.*

[75] Stoyanovsky, *La théorie générale des mandats internationaux* (1925); Wessels, *op. cit.* Cf. the view of van den Heever J. in *Verein Für Schutzgebiedsanleinen E.V.* v. *Conradie, N.O.*, reported in [1937] A.D. 113 ff., that sovereignty, wherever it might then be residing, was held ' in trust for the future State to emerge from its present chrysalis or into which the present Mandated Territory will emerge ' (at 121).

[76] Brierly, 16 B.Y.I.L. (1929), 217, and *The Law of Nations* (4th ed., 1949), 157–9; *Ffrost* v. *Stevenson* (*supra*).

[77] P. 132.

[78] P. 168.

[79] P. 150.

Alvarez.[80] As South-West Africa is the only one of the former mandated territories which has not become an independent state or the subject of a trusteeship agreement, the search for the location of sovereignty in a mandated territory, on which considerable effort has been expended, yielding much heat but little light, might well now be abandoned.

ELLISON KAHN.[81]

[80] P. 180.

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THE LEX SITUS AND HERITABLE (OR REAL) PROPERTY

It is a matter of regret to Scots lawyers who are interested in the study of Conflict of Laws that in the leading textbooks a number of Scots cases are not referred to, particularly decisions in the Outer House of the Court of Session, which are decisions of judges of first instance. A number of Inner House cases, which are decisions of the Appeal Courts, are cited but even so, some important decisions have been omitted. Although in some instances these cases are in a sense peculiar to Scots law, as a whole they are really quite consistent with the main stream of authorities in England and the writer is of opinion that a number of them, if properly understood, may not only be cited as additional illustrations of some leading principles, but also help to clarify certain points. The object of this and succeeding articles is to draw attention to various Scots cases which further explain the leading principles; in this article the writer proposes to deal with the application of the *lex situs*, and also to attempt to suggest what is perhaps a new approach to certain English decisions which have been criticised by some of the writers of textbooks. The matter may be discussed under the headings (1) The distinction between immoveable and moveable property, (2) Capacity, (3) Sale of heritable property in Scotland by trustees under an English will and (4) Form.

1. *Immoveable and moveable property.*

In the Conflict of Laws a distinction is drawn between immoveables and moveables as opposed to the domestic distinctions between heritable and moveable and real and personal property of Scots and English law. The difference between the distinctions drawn in the conflict of laws and the domestic distinctions is explained clearly by Lord Tomlin in the case of *Macdonald*.[1]

There is no doubt, of course, that the *lex situs* determines whether a thing itself or a right connected with it is to be considered as immoveable or moveable.[2] This rule was affirmed in the leading Scots case of *Macdonald* in 1932 which is referred to only by Dicey but there were earlier Scots decisions which also illustrate the

[1] 1932 S.C. (H.L.) 79.
[2] *Dicey* (6th ed.), 521; *Wolff*, 511; *Cheshire* (3rd ed.), 547; *Schmitthoff* (2nd ed.), 40.

principle. In the case of *Downie*[3] the testator left (1) a mortgage granted by Glasgow Water Works Commissioners which was not secured by a conveyance of Scots heritable (or real) property and (2) a mortgage in his favour granted by an Australian which also was not secured over Australian property but which was payable in Australia. In an action by the testator's widow against his trustees in which she claimed payment of her legal rights the question arose as to whether the mortgages were heritable or moveable. It was held that the nature of the Scots mortgage must be determined by Scots law and that by Scots law it was heritable as regards the widow's rights. It was also held that the character of the Australian mortgage must be determined by Australian law. In *Train*[4] a domiciled Irishman had died intestate and without issue but survived by his widow, and his estate included bonds and dispositions in security over heritable property in Scotland. A bond and disposition in security is a deed consisting of a personal obligation by a debtor to repay a sum borrowed by him and a conveyance by him to the creditor of certain heritable property in security of the loan. Originally such bonds were wholly heritable in succession to the creditor's estate but by statute they have been made moveable except for certain purposes. It was held in *Train* that as regards the widow's rights the character of the bonds must be determined by Scots law which was the *lex situs*. By that law they were heritable as regards the widow's rights with the result that the widow could claim terce, which is a right exigible out of the heritable state. Otherwise the bonds were moveable and the succession to them on intestacy was determined by the *lex domicilii* of the deceased under which the widow was an *heir in mobilibus*.

In *Macdonald*[5] the daughter of a domiciled Scot claimed legitim, which is a claim by a child to a share of the moveable estate. The deceased's estate included land in Canada and a mortgage over land in Canada and by Canadian law, land and mortgages over land descend to the persons who succeed to the moveable (or personal) estate. A question arose as to whether the Canadian land and mortgage were heritable and therefore not subject to legitim or moveable and subject to legitim. It was held by the House of Lords, affirming the Second Division of the Court of Session, that the character of the Canadian assets must be determined by the *lex situs* and that by that law they were in nature immoveable and therefore not subject to the claim for legitim in the administration of the estate.

[3] 1866, 4 M. 1067.
[4] 1899, 2 F. 146.
[5] *Supra*.

The same principles were applied in the cases of *Breadalbane's Trustees*[6] and *Monteith*[7] but these cases will probably not be followed in future because they related to English mortgages and the Courts in deciding them appeared to have proceeded upon insufficient information as to English law.[8]

Effect was also given to the principle in the case of *Moss's Trustees*[9] which related to debentures of foreign companies.

2. *Capacity.*

Capacity to bequeath, acquire, mortgage or dispose of heritable property is generally agreed to depend on the *lex situs.*[10] The cases usually cited in support of this proposition include *Birtwhistle* v. *Vardill*[11] and *Bank of Africa* v. *Cohen*[12] and to these may be added the Scots Outer House cases of *Ogilvy* v. *Ogilvy's Trustees*[13] and *Black* v. *Black's Trustees.*[14] In *Ogilvy* a beneficiary under the will of a domiciled Scotsman was a minor who resided in New York and his father, who also resided in New York, had been appointed as his guardian by the Surrogate Court of Westchester County, New York. The estate to which the minor beneficiary was entitled included a legacy of £50,000 and a house in Kirriemuir, in Scotland. The father as guardian and the son as an individual raised an action against the trustees acting under the will in which they craved decree ordaining the defenders as trustees to pay over the moveable estate to the guardian and to convey the dwelling-house to the minor beneficiary with the consent of the guardian and they tendered formal discharge. The validity of the discharge was challenged originally both as regards the moveable and the heritable estate but the challenge as regards the moveable estate was not insisted upon and Lord Moncrieff observed (page 84, col. 1) that he thought that counsel was well advised to do so. Lord Moncrieff held that the minor could not grant an effective discharge upon receiving a conveyance of the property with which he had no capacity to deal and that the guardian had no authority to grant a discharge which would be sufficient to exonerate the trustees. The decision and observations in this case are entirely in accordance with the general principles stated in the textbooks and in addition

[6] 1843, 15 Sc.Jur. 398.
[7] 1882, 9 R. 982.
[8] See Lord Tomlin in *Macdonald*, 1932 S.C.(H.L.) 79 at 85.
[9] 1916, 2 S.L.T. 31.
[10] *Dicey* (6th ed.), 531; *Cheshire* (3rd ed.), 731; *Wolff*, 532; *Schmitthoff* (2nd ed.), 128 and 167.
[11] (1840) 7 Cl. & Fin. 895.
[12] [1909] 2 Ch. 129.
[13] 1927 S.L.T. 83.
[14] 1950 S.L.T. (Notes of Recent Decisions) 32.

Lord Moncrieff reviews the earlier authorities of Scots law. This case is referred to in *Dicey*, 6th ed., p. 537, but the citation is not quite correct and this fuller reference to the decision may be of assistance.

Whether or not the case of the *Bank of Africa* v. *Cohen* really concerned a question of capacity or one of form, the Court treated the matter as one involving capacity and the case may therefore be regarded as authority for the proposition that, in matters relating to real or heritable property, capacity depends upon the *lex situs*. Any doubt as to the true effect of the statutes referred to in the case does not affect the validity of the decision as regards capacity generally.

The question of capacity as regards both heritable and moveable property was considered again in the recent case of *Black* v. *Black's Trustees* which was decided by Lord Mackintosh on June 30, 1950. In this case a Scotswoman married a medical practitioner whose domicile was in the Transvaal and some time after the marriage she executed a trust settlement under which she conveyed to trustees, for certain purposes therein set forth, all estate heritable and moveable which then belonged to her or which she might subsequently acquire. The action was an action at the instance of the husband with consent of the wife against the trustees to have it declared that the trust settlement was null and void in that it contravened the law of Transvaal, which was the law of the matrimonial domicile and under which a marriage which is not preceded by an antenuptial contract of marriage creates a universal partnership between husband and wife under the sole administration of the husband in all moveable property wherever situated and in all heritable property in the Transvaal. At the date of the action the wife had succeeded to certain moveable estate, to a *pro indiviso* share of heritable property in Scotland and a *pro indiviso* share of a house in Malacca, Federated Malay States. Lord Mackintosh held that the trust must be reduced as invalid in so far as it purported to convey moveable property wherever situated and heritable property situated in the Transvaal but that *quoad ultra* it was valid. In his Lordship's opinion, the capacity of the wife as regards the moveable estate was regulated by the *lex domicilii* and as regards heritable property, by the *lex situs*. Her capacity to convey heritage in Scotland was therefore regulated by Scots law and the trust therefore subsisted as regards the Scots heritage; as regards the property in Malacca, his Lordship held that it had not been proved that according to the law of Malacca, the wife had no capacity to convey the property situated there.

3. *Sale of Scots Heritage by English Trustees.*

Although this question perhaps is primarily a question of Scots conveyancing, a full examination of the authorities showing how the generally accepted principles have been applied in special circumstances may be of interest, particularly as the cases referred to in the succeeding paragraphs are cited only by *Dicey* and in the latest edition of that work only in a footnote on page 327.

If a person purchases heritable property in Scotland the general rule is that the seller must produce a good title for the prescriptive period of twenty years and that that title must be what is known technically in Scots conveyancing as a marketable title. If during the prescriptive period prior to the sale, trustees under a will have sold the property, the purchaser's solicitor must satisfy himself that the trustees did in fact have power to sell. This power may be, and usually is, conferred expressly upon the trustees by the will, but in any event the Trusts (Scotland) Act, 1921, s. 4, confers a power of sale on trustees when the exercise of such a power would not be at variance with the purposes of the trust. As a rule there is no difficulty in the case of a Scots will prepared by a Scots solicitor but difficulties arise sometimes when land in Scotland is sold by trustees acting under the will of a domiciled Englishman if that will does not confer an express power of sale upon the trustees. In such a case the power conferred by the Scots Trusts Act does not apply because that Act applies only to Scots trusts. This was decided in the case of *Carruthers Trustees*[15] which related to the Act of 1867 but the decision will apply to the Act of 1921.

Under the English Trusts and Conveyancing Acts, trustees have power to sell real property in England but these Acts do not apply to Scotland, and any power which may be conferred upon trustees under them can have no application to heritage in Scotland. A contrary opinion might appear to be given in Mackenzie Stuart on *The Law of Trusts* at page 238 where it is stated that 'if the English trustees have power to sell the trust estate, no further powers are needed from the Scots courts to make a sale valid'. The only authority cited is the case of *Phipps*[16] but reference to Lord Dewar's opinion in that case makes it clear that he granted power 'not in respect of the English Acts referred to which do not apply to Scotland, but because the testator intended to confer upon (the trustees) and . . . did confer upon them all the powers enumerated in the Scots Acts'.

[15] 1897, 24 R. 238.
[16] 1914, 1 S.L.T. 239.

This question has arisen in the past on several occasions but it is not provided for by any of the statutes at present in force. In the case of *Allan's Trustees*,[17] trustees under an English will, who were the owners of heritage in Scotland, applied to the English court for power to apply to the Court of Session for power to sell and this application was granted. They then presented a petition to the Court of Session and the Court of Session in the exercise of its *nobile officium* granted power to sell, primarily in view of the fact that the English court had granted power to apply to it and had stated that it was in the interests of the trust that the Scots heritage be sold. It should be explained that the *nobile officium* is a power or noble office vested in the Court of Session as the Supreme Court of Scotland to grant a remedy in cases in which it is equitable that a remedy be granted but the existing law provides no such remedy. There are certain restrictions upon the exercise of the power but they are not relevant to this article. The case of *Allan's Trustees* was followed in the case of *Pender's Trustees* [18] in which the facts were very similar, but the power requested was power to feu instead of to sell land. The court granted a general power to feu and it was observed that in the past,[19] the same trustees had obtained power to feu and lease particular areas. The question arose again in the case of *Harris's Trustees* [20] in which trustees acting under an English will were the owners of heritable estate in Scotland. They applied to the English court and obtained power similar to that granted in the cases of *Allan* and *Pender*. The difference, however, was that in this case the will contained an express power to sell from which the Scots estate was excluded. The Court of Session by a majority exercised its *nobile officium* and granted power to sell. Lord Dundas, who dissented, did so on the ground that, as the Scots estate was excluded from the power to sell, the Court of Session should not exercise its *nobile officium* and grant power to sell. The writer submits that these cases taken together show that trustees under an English will, who own heritage in Scotland and desire to sell it, but do not possess a power of sale under the will, may nevertheless ultimately obtain power to sell if they follow a procedure requiring two petitions. They apply first to the English court and, if the English court grants power to apply to the Court of Session and expresses an opinion to the effect that the sale is in the interests of the trust, they may then apply to

[17] 1897, 24 R. 238 and 718.
[18] 1907 S.C. 207.
[19] 1903, 5 F. 504.
[20] 1919 S.C. 432.

the Court of Session which may, if it thinks fit, exercise its *nobile officium* and grant power to sell. If the court grants such a power, the power will be a power in accordance with the *lex situs*.

The cases of *Forest* [21] and *Georges* [22] are examples of the first of the two steps. The most recent example of both steps is *Laurie's Trs.*[22a]

4. *Form.*

The question of form may be considered with particular reference to agreements or contracts and powers of attorney, conveyances and securities.

(a) *Agreements.*

Agreements to acquire or dispose of heritage in Scotland and obligations to convey such heritage are governed by the proper law of the contract which is not necessarily the *lex situs* and it is considered to be good law that if any agreement is made outwith Scotland to sell heritage in Scotland, the agreement may be executed either in accordance with Scots law or in accordance with the proper law of the contract. In the same way, a power of attorney authorising the sale of heritage in Scotland, if executed outside Scotland, may be executed in the form required or permitted by Scots law or of the proper law of the power or the law of the place where it is executed. There are few Scots authorities on this matter but such authorities as there are are referred to in Green's *Encyclopædia of the Law of Scotland*, Volume 13, p. 130. Suppose, however, that the seller of heritage is an attorney who tenders a power authorising him to sell but the power is executed in a form which is insufficient according to the *lex situs* although it is said to be in accordance with the law of the place of execution; must the attorney satisfy the purchaser that the deed complies with the law of the place of execution? The writer thinks that the answer is that he must do so—otherwise the purchaser will have no guarantee that his title will be good.

(b) *Conveyances.*

It is clear that an *inter vivos* conveyance must comply with the *lex situs*.

(c) *Securities.*

The safe rule to follow, of course, is to make sure that securities over heritage are constituted in accordance with the *lex situs*, but

[21] 1910, 54 S.J. 737.
[22] 1921, 65 S.J. 311.
[22a] 1946 S.L.T. (Notes of Recent Decisions) 31.

nevertheless a security which does not comply with the *lex situs* is not altogether worthless. In certain circumstances, such a security may be quite effective provided that there are no valid securities according to the *lex situs*. The law is stated clearly in *Palmer's Company Law*, 19th ed., at pp. 260–261.

In Scotland a security over heritable property should take the form of a bond and disposition in security or of an *ex facie* absolute disposition qualified by a back letter explaining that the disposition is truly a security writ. It is inadvisable to attempt to obtain a valid security over heritage in Scotland by means of a floating charge or of an equitable mortgage. An interesting case is that of the *Ballachulish Slate Quarries Co., Ltd.* v. *Menzies* [23] in which a Scots company endeavoured to create a security over its uncalled capital by executing a floating charge. Subsequently the company went into liquidation. It was held that a Scots company could not create a security over its uncalled capital by such a method and that the holders of the charge had obtained no preference.

The decision in that case has nothing to do with the *lex situs*, of course, but the result would have been exactly the same had the company attempted in such a manner to create a floating charge over its heritable property in Scotland.

That case may be distinguished from *Re Anchor Line (Henderson Brothers), Ltd.*,[24] in which it was cited although it was not referred to in the judgment. In the *Anchor Line Case*, a company incorporated in England owned heritable property in Scotland. According to the report the company executed a floating charge over all its assets in favour of the Union Bank of Scotland, Ltd., but the writer understands that, prior to that date it had granted bonds and dispositions in security in Scots form over the heritable property affected by the floating charge. The company went into liquidation and the property was sold. There could have been no question that the bonds must be repaid out of the proceeds of the sale and the question at issue was simply whether the floating charge was effectual over the balance of the price. The unsecured creditors maintained that on the strength of the *Ballachulish Case*, and other authorities the floating charge was valueless but it was held that it was quite effective. The writer submits that the decision is quite correct and that the true ratio may be explained thus. The right created by the floating charge could have no force at all against a security valid by the *lex situs* of the property but as soon as the property has been sold and the valid security

[23] 1908, 45 S.L.R. 667.
[24] [1937] Ch. 483.

redeemed, the *lex situs* no longer has anything to do with the matter. The scene then shifts from the *situs* of the property to the *situs* of the liquidation and by that law the security is valid and gives a preference to its holder.

Even if the property had not been sold, a similar result, the writer submits, would have been reached if there had been no security valid by the *lex situs* or if any such security had been redeemed. In that event there would have been a competition as to heritable property between the holder of a floating charge and the unsecured creditors represented by the liquidator. Such a competition would be one of right and not title and would be determined by the law governing the administration of the liquidation and not the *lex situs* of the property although the validity of the claimant's rights would depend on the proper law of the contract by which the rights were created. This is in accordance with the decision in the case of *Ex p. Pollard.*[25] In that case Thomas and George Courtenay carried on business in partnership in London and Kirkcaldy and the firm were the owners of heritable property in Kirkcaldy. The report states that a title had been completed in the name of Thomas Courtenay under an Instrument of Sasine (or seisin) duly recorded in the Register of Sasines following on a disposition—the modern Scots method of the direct recording in the Register of Sasines of a disposition or conveyance has by statute the same effect. The firm deposited the titles of the Kirkcaldy property in London with Pollard and granted a memorandum of deposit in his favour but at a later date the firm became bankrupt. The memorandum was ineffectual in Scotland and could not have given Pollard an effective right against a creditor holding a duly completed security in Scots form but it was held that, in the absence of such a valid security, the rights of the English creditor holding the deposit and the unsecured creditors fell to be determined by English law on the ground that the English courts will enforce equities with reference to foreign land against persons subject to the jurisdiction of the court. This was the principle upon which the later case of *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* [26] was decided.

The writer is of opinion, that the cases of *Pollard* and *Anchor Line* are entirely consistent in that both, Scotland was the *situs* of the property, England was the *situs* of the bankruptcy and liquidation and the holder of the security was English. The principle is that the liquidator or trustee goes to the *situs* of the property and satisfies the rights of the holders of securities valid

[25] (1840) Mont. & Ch. 239.
[26] [1910] 1 Ch. 354 and 387.

by that law. Having done this, he then returns to the *situs* of the liquidation or bankruptcy and administers the estate for behoof of the creditors. From that point onwards the *lex situs* of the property really ceases to have anything to do with the matter and there is only a competition between personal rights. The same ratio appears to the writer to underly the decisions in *Hicks* v. *Powell*,[27] *Coote* v. *Jecks*[28] and *Ex p. Holthausen*.[29]

In *Bank of Africa, Ltd.* v. *Cohen*, there was no question of bankruptcy or of a competition between personal rights; the action was for specific performance of a contract to execute a mortgage over land in Johannesburg and from this point of view the decision may be distinguished from that in *Pollard*. If a question of form was really involved, the decision is admittedly difficult but the court treated the question as one involving capacity. In addition as the editors of the fifth edition of *Dicey* pointed out at p. 957, in the *Bank of Africa Case* the contract was intended to have direct operation in Africa and it may be argued that the *lex situs* must therefore apply both as to form and capacity. *Pollard*, on the other hand, concerned merely the question of competing rights outside the *situs* of the land.

The law has been developed further in the case of *Shop Fronts (Great Britain), Ltd. in Liquidation*,[30] which was decided by Lord Birnam on July 13, 1950. This was a petition by a liquidator for determination of a question which had arisen in the winding up of a company incorporated in Scotland but having a place of business and assets in England. Certain sums of money had been lent to the company by an Englishman, and in security, the company had granted two debentures which were executed in Scotland in English form and duly registered with the Registrar of Companies in England. By the debentures, the company purported to create a floating charge over its whole property and assets. It was admitted that the floating charge would not be recognised as valid as regards the property in Scotland but the question arose as to whether the debentures created a valid security over the assets of the company in England. In his opinion, Lord Birnam referred to the *Anchor Line Case*, and stated that the ratio of the judgment in that case appeared to have been that the validity of a floating charge falls to be determined by the law of the country in which the company had its registered office. As in this case the company was incorporated in Scotland

[27] (1869) L.R. 4 Ch. 741.
[28] (1872) L.R. 13 Eq. 597.
[29] (1874) L.R. 9 Ch. 722.
[30] Not yet reported.

and as Scots law does not recognise a floating charge, his Lordship held that he must decide against the validity of the debentures even as regards the property in England unless there was some provision in the Companies Act or some principle of Scots law or equity which would lead to a different result. His Lordship considered the provisions of sections 95, 106 and 319 of the Companies Act but was of opinion that the debentures had not created an effectual security over the assets in England.

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NOTES

Private International Law in Ethiopia

It will be readily understood that the law of Ethiopia has not yet developed any fixed rules of Private International Law. The legal system is far too primitive for anything of that kind. But there is such a thing as an International Law of Necessity, in this interdependent world. And a *Handbook to the Laws of Ethiopia*, which has recently been written by Judge Nathan Marein, who is legal adviser to the Ministry of Justice in Addis Ababa and was formerly acting President of the High Court of Ethiopia, has some illuminating passages about the practice of the courts in dealing with cases in which foreign persons and foreign interests are involved.

The author, who is an advocate of the Palestine Bar, trained in the Jerusalem Law School of the former British Government of Palestine, has been a legal adviser or a judge in Ethiopia for eight years; and he is concerned in his handbook, which summarises many aspects of the Ethiopian law, to help the judges and advocates in that country, and also those who have commercial and financial dealings in it, ' to know how they stand with the law here '.

Since the Emperor was restored to his throne in 1941, he has had English-trained lawyers as legal advisers and also as President of the High Court. It is natural, therefore, that English principles of Private International Law have been applied in cases where the court has had to deal with problems and situations in which the customary law of Ethiopia was clearly unsuitable. In the English way development has been left to judges.

There is an illuminating passage in the foreword to the Ethiopian Penal Code issued in 1930 by the Emperor, directing the judges ' to act according to your observations and the conditions of times and seasons '.

The matters in which rules of the conflict of laws have come to the consideration of the Ethiopian courts are mainly—Marriage and Divorce, Wills and Administration of Estates, Foreign Judgments, Nationality and, lastly, Taking Evidence on Commission.

Marriage and Divorce

Taking these in their order, the courts have recognised marriages performed outside Ethiopia as valid if made in accordance with the law of the place of celebration. The Law of Nationality issued in

1930—that is, before the Italian invasion—considers a marriage between an Ethiopian and a foreign woman as valid if it is celebrated in Ethiopia in accordance with any of the forms of an Ethiopian civil marriage. It also considers as valid the marriage between an Ethiopian and a foreign woman outside Ethiopia if it is solemnised in accordance with the lex loci celebrationis.

The marriage of an Ethiopian woman with a foreign husband in Ethiopia is valid if celebrated before the foreigner's consular authority or in the municipality of Addis Ababa. If celebrated outside Ethiopia, it is valid provided that it is in accordance with the national law of the husband, and that the form was in accordance with the law of the place of celebration.

The law gives full regard to a Moslem marriage whether the parties are nationals of Ethiopia or foreign Moslems. That, it may be noted, is the principle adopted also in the law of Palestine. The national law does not come into consideration in such cases.

As to divorce, the Ethiopian law holds that marriage celebrated in the Church cannot be dissolved. By the rules of the Monophysite (Coptic) Church a marriage is indissoluble. Civil marriages, however, can be dissolved by consent or by the will of either of the spouses. The High Court has accepted jurisdiction in divorce of foreigners where they were resident in Ethiopia. It has in several such cases applied the law of the nationality of the parties and not the law of the domicile, requiring the national law to be proved by evidence. The English doctrines of domicile as the basis of the personal law are too complicated for foreign adoption. In this connection it is noticeable again that the English legislator in Mandatory Palestine chose the principle of nationality to govern the status of foreign subjects, except where the national law, *e.g.*, the English law, imported the principle of domicile.

In a recent case, however, the High Court found that, under an unwritten Ethiopian custom, a wife is not entitled under any circumstances whatever to alimony. The Court, composed of one British judge and two Ethiopian judges, applied this rule in a divorce suit between two foreigners, accepting that the law of 'domicile of choice' applies. In other words, the principle of applying the law of nationality to matters of personal status in the case of foreigners has been superseded by the system of the law of domicile. However, as foreign judges in Ethiopia are not infrequently changed, and new judges may in their legal experience have followed a different system, it may well be that the High Court differently constituted will again revert to the law of nationality.

The High Court in several cases refused to issue a divorce to Roman Catholics married in the Church, because of the tenets of the

Catholic Church; and in these cases granted a judicial separation. An interesting decision with regard to the custody of a child of divorced foreign subjects was given by the Supreme Imperial Court. The mother was given the custody. After the mother's death the father applied for the custody of his eleven-year-old daughter, but the court refused his application because at the age of eleven, as they held, the child was old enough to express her wish, and she had asked to go to her mother's brother and not to her father.

Following the highest principles in such cases the basis of the decision was that the wellbeing and happiness of the child should prevail.

The divorce of Moslem subjects, whether Ethiopian or foreigners, is in the jurisdiction of special Moslem courts applying the religious law.

Wills and Administration of Estates

The principle of nationality is applied by the courts also in dealing with a contested will of a foreigner, or matters of administration of an intestate foreigner. But where immovable property is concerned, the court has always applied the Ethiopian law. That, too, is in accordance with the English principle which maintains the supremacy of the *lex situs*. In one case, where the foreigner's nationality could not be ascertained, the Supreme Court applied the Ethiopian customary law. There is also a record of the application of that law in the distribution of the estate of a Greek national domiciled in Ethiopia. That would appear to indicate that the principle of nationality is not fixed as the basis of the law of personal status.

It is interesting that the Ethiopian law does nothing to distinguish between children born in or out of wedlock. They all inherit in equal shares.

With regard to Moslems who are foreign subjects, the law of inheritance is the Moslem law.

The Ethiopian law with regard to wills is uncertain. Some judges hold that a man cannot will away his property from his children. Others hold that, provided the form is in accordance with the customary rules, no limit should be imposed on the testator.

Where a will of a foreign subject has come before the High Court for adjudication, the general rule has been to apply the national law of the testator to questions both of capacity and of form. But in a case where the testator was a German refugee, who had been deprived of his German nationality under the Nazi régime because of his religion, the opinion of the majority of the judges was that he

should be regarded as of unknown nationality, and the Ethiopian customary law should, therefore, apply.

It is pertinent to mention that at present there is no doctrine of judicial precedent, and, therefore, the rules on these matters are fluid.

Foreign Judgments

The Ethiopian State has not yet entered into conventions with foreign Governments with regard to reciprocal execution of judgments. The High Court has, however, ruled that a case may be brought in the Ethiopian courts based on a foreign judgment. It is treated as a fresh suit, and the foreign judgment is regarded on the same footing as a written contract between the parties. Where, however, a foreign judgment concerned land situated in Ethiopia, the court held that the land could only be disposed of in accordance with the laws of Ethiopia. The general rule is that a foreigner may not hold land without special permission. That principle was applied to a judgment given by the High Court of Bombay which affected land in Ethiopia.

Nationality

The nationality law, which is one of the modern legislative enactments of the country, adopts the most up-to-date principles with regard to the nationality of married women. An Ethiopian woman marrying a foreigner, in Ethiopia or abroad, only loses her Ethiopian nationality if, on her marriage, she assumes her husband's nationality according to his law. She can regain her nationality after divorce, separation or death of her foreign husband, provided she takes up her domicile in Ethiopia. A foreign woman marrying an Ethiopian acquires his nationality on her marriage. Any person, however, born in Ethiopia of a foreign father and an Ethiopian mother is considered as an Ethiopian subject, but has a right of option later for the foreign nationality of his father. An Ethiopian who is naturalised abroad loses his Ethiopian nationality, but can always apply for its restoration on returning to the country. The adoption of an Ethiopian child by a foreigner does not make any change in the national status of the child. The conditions for naturalisation of a foreigner in Ethiopia are :

1. Full age.
2. Residence in Ethiopia for at least five years.
3. Ability to support himself and his family.
4. Fluent knowledge of Amharic (the official language), and ability to read and write it.
5. That he has never been convicted by a court for any crime.

Applications for naturalisation are made to the Minister of Foreign Affairs; and the grant or refusal of the application is within the absolute discretion of a special committee.

Evidence on Commission

The question of evidence taken abroad on commission has come before the High Court of Ethiopia, with rather unsatisfactory results. In a criminal case the court ordered evidence on commission to be taken for the prosecution in Eritrea. The decision of the High Court was subject to appeal to the Supreme Imperial Court, which held that, since there was no law in force in Ethiopia about such procedure, and no rules for taking evidence abroad existed, the decision of the High Court could not stand.

On the other hand, evidence on commission in criminal matters may be taken from witnesses in Ethiopia where communications are difficult or the health of the witness does not allow him to travel, and special provisions were made for this procedure in 1943. It might have seemed reasonable to extend the practice to the taking of evidence abroad.

Ethiopia has not entered into any conventions with foreign States about taking depositions abroad for a civil suit. If a foreign court should need to take evidence of a witness in Ethiopia, the only recourse at present would be to address a request for taking the evidence through diplomatic channels. The President of the High Court has the power to issue rules of procedure at any time; and he could use that power to frame rules for taking such evidence.

Norman Bentwich.[1]

The International Law Association Conference at Copenhagen, 1950.

The Forty-fourth Conference of the International Law Association was held at Copenhagen from August 27 to September 2, 1950, and was attended by lawyers from some thirty countries, as well as by representatives from the United Nations, the International Civil Aviation Organisation, the *Comité Maritime International*, the *Institut de Droit International*, the International Chamber of Commerce, and the *Institut International pour l'Unification de Droit Privé*. The largest delegation came from the United Kingdom, with Denmark second and the United States third. All continents were represented, but nobody came from east of the Elbe, although

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five Yugoslav lawyers arrived shortly after the opening of the conference. This was the first time since the war that Yugoslavia had participated in an I.L.A. Conference, and the first time that the Cominform countries were unrepresented. The universal character of the I.L.A. has moved far since 1946 when the forty-second Conference was held in Prague. Everyone participating in the Conference regretted the absence, due to illness, of the Association's Chairman, Lord Porter, although Professor Goodhart, the Vice-Chairman, admirably maintained the rules of order in his absence.

No one attending the Conference will ever forget the hospitality and friendship shown by the Danish people, while the Danish Branch of the International Law Association has rendered it difficult for any other national branch of the association to compete in arranging future conferences. The Conference itself set off to a good start, the opening session in the Parliament House being held in the presence of their Majesties the King and Queen of Denmark. After the formalities involved in transferring the Presidency of the Association from M. Devèze, who had presided over the Brussels Conference in 1948, to Judge Boeg, the President of the Danish Branch, had been completed the conferees settled down to hear an address by Dr. Ivan Kerno, the Assistant Secretary-General of the United Nations. Dr. Kerno described the Charter as universal international law which had rendered the concept of neutrality outmoded and non-existent. He also paid tribute to the work of the Association as an influence on the activities of the United Nations.

It is uncertain whether Dr. Kerno would be willing to express the same praise for the achievements of the 1950 Conference, the keynote of which seems to have been 'Reference Back'. The Conference lasted five and a half days. The first morning was devoted to the opening session, and the last to the formalities of the closing session and the approval of resolutions. Of the remaining time more than a complete day was devoted to a discussion and the approval of the new Constitution of the Association. Listening to the temper of some of the speeches in this debate one might have been excused for thinking that the future of international law—and almost of the world itself—depended on the adoption of this document. In the past, the emphasis in the membership of the I.L.A. has been upon the individual rather than upon the Branches, now it has been reversed. So much is this so, that if a Branch decides to expel one of its members 'such member shall cease to be a member of the Association, unless the Executive Council shall decide that he shall continue as a headquarters

member '. In view of the fact that individuals may be members of the Association as such without joining any Branch, even though such membership is described as headquarters membership, it would probably have been wiser to provide that expulsion from a Branch should involve expulsion from the Association only if the Executive Council should decide accordingly. This at least would have preserved the individuality of the membership, and it is no explanation of the change to say that expulsion is rare or even unknown. Formerly, the Executive Council of the I.L.A. was self-appointed; now, however, it will be elected by the Branches, each of which is entitled to one representative if its membership is between twenty and 100, two if under 250, and three if above that number. The headquarters members, who will apparently be completely unorganised, are entitled to similar representation. In the case of headquarters members expulsion will be effected by the Executive Council of the Association.

A very large delegation of United States lawyers attended the Conference, and the American Branch was responsible for reports and draft resolutions on virtually every subject on the agenda. Of these, perhaps the most important was that on Rights to the Seabed and its Subsoil. Reports had been prepared by an international committee set up by the Association, the French Branch and the American Branch. In addition, the papers on the Continental Shelf read to the Grotius Society by Sir Cecil Hurst and Professor Waldock in 1948 and 1950, respectively, were circulated as a separate pamphlet. No subject could have been covered by more documentation than this. Among the American lawyers attending the Conference was the Attorney-General of Texas, a State which is at present engaged in litigation against the Federal Government on this subject before the Supreme Court. The Attorney-General circulated to all conferees a booklet by himself on ' Sovereignty and Ownership in the Marginal Sea ', to which was appended a memorandum supporting a plea for rehearing in *U.S.* v. *Texas* prepared by a body of ten lawyers including Professors Gidel, Hudson, Hyde, Kelsen, Masterson and Pound. In view of the vested interests involved in this matter, and the fact that the discussion lasted a whole day, it was only to be expected that radical differences of opinion should be expressed, but it was perhaps something of a shock when the matter was referred back to the Committee for further consideration, particularly as, when the matter was discussed at Brussels, it was decided to refer the matter to a Committee as ' there was not sufficient time in which to reach any conclusion ' (*Brussels Report*, p. 182).

Another subject on which no decision was reached was

'Nationality and Statelessness'. This subject was discussed, frequently with more emotion than reason. One of the most provocative suggestions was that put forward by Mr. W. Raeburn K.C., who advocated the establishment of a United Nations citizenship, the beneficiaries of which would enjoy equal status and protection in the territories of all members of the United Nations, although they would be unable to hold land or enjoy any rights which might link them with any one of those territories. Despite the inferior status which they would enjoy from the point of view of rights, the burdens cast upon them would be higher than those borne by the citizens of the member States, for Mr. Raeburn advocated some measure of compulsory military service in the forces of the United Nations for those entitled to its citizenship. The Conference instructed the Executive Council of the Association to bring the various reports and suggestions on this matter to the attention of the United Nations for reference to interested organs.

The only positive achievement of the Conference was the adoption of a new Convention on Commercial Arbitration to be known as the Copenhagen Convention, 1950. Unfortunately the debate on this draft convention was affected somewhat by the proposed title. It was pointed out that by adopting this Convention the I.L.A. would be giving expression to its thanks to Copenhagen and Denmark for the hospitality shown during the Conference week. The proposals met with great opposition from English lawyers, some of whom went so far as to say that they would never be able to recommend the proposed rules to any commercial house consulting them. *In fine*, the session of the Conference dealing with this subject adopted the Convention by one vote, and this decision was duly indorsed by the General Conference at the closing session. At this session the Conference also promulgated the York-Antwerp Rules, 1950.

Another committee of the Conference was instructed to examine and discuss a report on the development and codification of international law prepared by the American Branch and introduced by Professor Eagleton. This report was not so much concerned with the content of codification as with its machinery. It was felt that the organisation of the International Law Commission and of the United Nations Division for the Development and Codification of International Law required drastic overhaul. Perhaps the most radical proposal was that which advocated that the International Law Commission 'should study the methods by which it could be put into effect that a State would be obligated by a legislative treaty approved and submitted by the General Assembly unless it formally rejected the convention within a stated period of time'. Such a

proposal would turn upside down the present position with regard to drafts put forward by international institutions, and might well remove any value that the General Assembly now possesses as the forum to give expression to the *volonté general* of the world. If States feared that they would automatically become bound by a draft convention unless they expressly rejected it they would be far less likely to record a favourable vote in the General Assembly.

Among the other subjects considered by committees of the Conference were certain problems connected with air law, agency and trade marks, while short reports were read on the present position with regard to the international recognition of divorce as envisaged in the Prague Convention, 1946, and on sovereign immunities.

The Copenhagen Conference of the International Law Association was the first conference of international lawyers to be held since the United Nations decided to take action in Korea. In view of the fact that the opening session was addressed by Dr. Kerno, who stressed the high regard held by the United Nations for the activities of the International Law Association, it might have been expected that at least one session of the Conference would have been devoted to consideration of the legality of the actions of the Security Council in this matter. Nothing of this character was done. Instead of condemning the aggression of the North Koreans or making any reference to the activities of the Security Council, a gratuitous resolution which could be acclaimed with equal fervour by either the North or the South Koreans was adopted without discussion at the final session: ' Whereas, the settlement of disputes by peaceful means and the prevention of illegal use of force are fundamental prerequisites of a legal order; Whereas, the United Nations has been created as the legal organisation among States and peoples; Whereas, these principles are incorporated in the Charter of the United Nations; Therefore be it resolved that the International Law Association reaffirms its conviction that the illegal use of force must be opposed by all necessary means if the rule of law is to survive '.

The next Conference of the I.L.A. will, it is hoped, be held in Switzerland in 1952. The Swiss Branch will find it difficult to better the social programme organised by the Danes, but if the Conferences of the I.L.A. are to be anything more than social gatherings it is essential that those responsible for framing the Conference agenda lose their fear of tackling real problems and concrete issues.

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A Soviet Approach to Private International Law

The appearance of the first Soviet textbook on private international law since the war throws some interesting light, mostly on the negative side, on conflict of laws from the Russian viewpoint. Professor L. A. Luntz has written a substantial book (362 pp., *Publication of the Moscow Institute of Legal Studies*, 1949, in Russian) for students of the subject inside the U.S.S.R. According to a note by Prof. Karp last year (Soviet State and Law, 1949, No. 3, pp. 75–79), seven of the fifty-seven law teachers at the Moscow Institute are concerned with instruction in international law, almost as many as in the civil law or criminal law departments. Although the U.S.S.R. is a federation it is abundantly clear from the textbook that a native conflict of laws has not arisen, largely owing to substantial uniformity in the laws of the various member republics. The only promising feature is a directive of the Supreme Court of the U.S.S.R., which lays down elementary conflict rules to apply in inter-republican disputes. Curiously enough this directive is considered to be a municipal matter and not a subject for conflict of laws. It provides that the *lex situs* applies to property matters and the *lex loci actus* to transactions. We may then ask how a book of this length may be written. The answer is that the subject of private international law is considered to provide important illustrations of Western international ideas. The author in the early part of his book stresses the 'class character' of Western systems of conflict of laws. He suggests that study of our rules is necessary in the interests of vigilance for the reciprocal treatment of Soviet citizens. But all these arguments have an unconvincing ring. Professor Luntz obviously possesses considerable knowledge of his subject and feels it to be a valuable juristic discipline. The greater part of the book is devoted to foreign conflict of laws, with Anglo-American theory and practice at least as prominent as the doctrine and practice of Continental Europe. The statements of foreign law are accurate. The technical and juristic criticism is keen and generally sound. The laboured comments on the general viciousness of our rules are inevitable, no doubt, since the Zhdanov ruling that every form of intellectual activity in Russia must have a 'partisan' colouring. There is no sign of any indigenous Russian ideas on the subject. The concepts of traditional private international law are accepted unreservedly, though their application is often criticised. It is nowhere argued that Soviet institutions require a new system. Indeed the neutrality of our subject is its shield, since it pays no account to the actual content of rules. Ideas of 'public policy', the notable exception, come in for a good

deal more criticism, but the Soviets do not reject them; on the contrary they use them to assert policies of their own. Excessive appeal to the *lex fori* is criticised, but an analysis of the author's statements shows that he, too, tends to apply Soviet law very widely as the *lex fori*.

Professor Luntz deals with Soviet rules or suggested rules as a brief and factual appendix to his fuller and more keenly argued presentations of foreign law. Some attempt will be made to describe these rules, though on most points there is either no direct authority or merely a current practice based on treaty or statute. On classification or characterisation he insists on applying the relevant foreign law to secondary as well as primary cases. Thus if it is clear that Soviet law governs the validity of a marriage, it should also be conclusive as to the character of that marriage, and foreign ideas of a 'christian marriage' should be irrelevant. Common classification by the *lex fori* is attacked (66). Luntz denies that one is begging the question in applying foreign classifications, since there is a factual connection with some foreign country before any law is applied (100–104). An actual example of Soviet classification is the old Russo-German trade agreement of 1925 which provided that Soviet building leases were to be treated as immovables, and that claims by escheat were to be regarded as claims by succession and not occupation (99). He states that Soviet law accepts the renvoi and also recognises references to third legal systems. The authority for this is to be found in the terms of various trade agreements and in Russia's ratification of the Geneva Convention on Bills of Exchange. He criticises Western reservations in favour of local public policy as destroying mutual relations between East and West and belying diplomatic recognition of the Soviet regime. This objection is difficult to understand. In the first place Western capitalist nations trade freely and peacefully in spite of legal reservations for public policy. In the second place, Soviet law, in the author's view, asserts reservations of its own, *e.g.*, it will not recognise as invalid a mixed (negro-white) marriage celebrated in a State which prohibits such marriages, and it will not allow common employment to be pleaded as a defence to a foreign tort committed where such a defence is recognised (120, 163, 275). The U.S.S.R. is no doubt sensitive on this point, since its nationalisation policy has been a common occasion for appeals to Western public policy. But if 'public policy' is a national weapon, it is a weapon which the Soviets have decided to use themselves. Proof of foreign law may be discussed at this stage, since rather perverse misinterpretations of Soviet statutes have often been combined with appeals to public policy, where

Soviet confiscations are concerned. The Soviet court, it is pointed out, does not leave this matter solely to the parties, but can insist on calling experts and can ask the Foreign Ministry of the U.S.S.R. to supply the necessary information. (Art. 8 of the Civil Procedure Code of the Russian Republic.)

Soviet courts are open to alien litigants. No alien may own land in the U.S.S.R. any more than a citizen, but Soviet citizens will be supported in their claims to land in other countries (158, 188). It is denied that this is illogical. Soviet law is applied both to the capacity of Russians abroad and to the capacity of aliens in the U.S.S.R., *e.g.*, the age of majority is eighteen years (163).

The status of corporations is especially fully dealt with. There are several reasons for this. The Soviet dissolution of pre-Revolutionary Russian corporations became prominent in the numerous Russian bank cases. Foreign corporations are suspected as especially capitalistic and dangerous. The U.S.S.R. trades through a number of public corporations. Hence this subject is unusually controversial. The general principle is that recognition of foreign juristic personality must be based on some treaty to which the U.S.S.R. is a party, *e.g.*, a trade agreement naming such a body. Such a corporation might sue a Soviet citizen in the U.S.S.R. on a cause of action arising outside its borders. It could not sue on a local cause of action unless it had been specially licensed to trade within the U.S.S.R., which is unusual. In this latter case Soviet law would apply. Soviet public corporations are distinct from the Soviet State, but claim to share its immunity. The results are interesting. If a warship of the Russian Navy negligently damages a foreign vessel, the Russian mercantile shipping administration may none the less recover salvage claims for saving it, as the two agencies are not to be identified. On the other hand the administration would, it is insisted, be entitled to rely on the immunity of a foreign sovereign if one of its vessels negligently damaged a vessel belonging to a Western firm. Most countries do extend the privileges of immunity to Government trading bodies, and Western nationalisation policies exclude any other possibility. It is interesting to note from another source that a distinction is drawn between the State and its economic instrumentalities so far as Soviet municipal law is concerned. The State is exempt from responsibility for torts, but this privilege does not extend to economic activities. The authority is a ruling directive of the Soviet Supreme Court dated June 10, 1943, No. 11 M 6 Y (printed in the 1946 collection of directives, p. 176, para. 4). It states that only under special statutes may a State agency be sued for

damages, but concludes, 'liability for losses caused by the acts of officials in performance of the economic or technical functions of the institution are governed by the general rules of liability'. Unfortunately this terse ruling give little idea of the principle involved. In practice the U.S.S.R. in its trade agreements often submits to foreign jurisdiction but usually limits execution of judgment to property or favourable balances situated in the foreign country. The author says that the balance of trade is always favourable to the U.S.S.R. so that no question of bringing actions in Russia has arisen.

By way of exception Soviet law has made specific provision for conflicts as to contractual form, by recognising the forms either of Soviet law or the *lex loci actus* (Art. 7 of the Civil Procedure Code of the Russian Republic). In practice most contracts must comply with special rules governing export-import transactions. As in some other countries 'contract' may be read so as to include wills and other dispositions, which rather extends the usefulness of the article in question. In general the *lex actus* would also be applied to the essential validity of a contract. Soviet foreign trade contracts must be in writing and observe certain other formalities (223). Soviet law applies to them in the absence of contrary agreement. This is justified on several grounds. The contracts are usually concluded in the U.S.S.R. which is therefore also the *locus actus*. But beyond this it is claimed that the original sovereign immunity of the Soviet contracting corporation implies that Soviet law will govern (227). If a trade agreement so provides, however, foreign law will be applied. Even in such a case the individual contract made under that treaty may in turn provide for the application of Soviet law. The U.S.S.R. is a party to the Geneva Convention on bills of exchange, but not cheques. Articles 34–36 of a Soviet Cheque Ordinance of 1929 deal with various conflict problems, *e.g.*, they recognise either Soviet capacity or national capacity, Soviet form or local form (269). Cheques are, in any case, only used in foreign trade and not in internal relations. Soviet law is widely applied to maritime contracts, *e.g.*, where the U.S.S.R. is the country of departure or destination or where either party is a Soviet citizen, to marine insurance effected in the U.S.S.R. and salvage cases tried there (in practice salvage cases go before a maritime arbitration commission). Soviet rules as to money clauses are applied imperatively, even to contracts governed in other respects by foreign law (261). All currency dealings are strictly controlled (Art. 24 of the Russian Civil Code). If a foreign-trade contract specifies payment in foreign currency that currency must be paid in specie, and not in rubles (the State bank handling

the transaction). Substitution of local equivalent is not allowed. No doubt the State thus ensures adequate foreign exchange. Fluctuations in purchasing power are uncommon since domestic prices are State-controlled. Where a revaluation occurs special provision is made for foreign contracts. Thus a decree of the Soviet Council of Ministers of December 14, 1947, art. 12, provided that changes in the purchasing power of the ruble should not affect contracts with foreign Governments (259).

The Russian law of tort (it is variously referred to as ' violation of law ' or ' causing harm ') is very general and less developed than the Anglo-American common law on the subject. It is claimed that a tort committed abroad would be actionable in the U.S.S.R. if wrongful by Soviet law as well as by the *lex loci delicti*. A tort committed by one Soviet citizen against another in a foreign country would be governed by Soviet law. Soviet law would also apply to collision cases tried by a Soviet court.

Soviet law is applied to marriages between foreigners in the U.S.S.R. Foreign incapacities are not generally recognised (301). Marriages between a Soviet citizen and a foreigner are invalid wherever celebrated (302), a remarkable result of recent legislation achieving precisely the effect of barring mixed marriages, which the public policy of the U.S.S.R. is said elsewhere to abhor. Foreign marital property regimes are not recognised, as based on principles inconsistent with the equality of the sexes (302). Foreign divorces of foreign nationals are recognised, as are decrees of nullity. The grounds need not be identical with those known to Soviet law, provided they are not repugnant to it. The consequences of divorce for a party living in the U.S.S.R. depend on Soviet law, *e.g.*, the right to alimony or the right to re-marry. In principle a Soviet court could divorce two aliens. But the author points out that this is only important if the aliens are domiciled in the U.S.S.R., have been there long enough to apply for a divorce, and are nationals of countries which base jurisdiction on domicile, so that the decree will be effective in their own countries. Soviet citizens must marry in Soviet consulates while abroad, but if this is impossible satisfaction of the local law on both form and substance might be sufficient. The foreign divorce of two Soviet citizens would not be recognised directly but might have a factual importance as grounds for a Soviet decree. Very little is said about jurisdiction in other fields of law, except that agreement can often found jurisdiction (335).

There is no concrete law on the subject of international successions. The former Russo-German treaty of 1925 provided that the

lex patriae should apply to movables and the *lex situs* to immovables in disputes between Russians and Germans. Otherwise the author is forced to resort to what he considers to be 'general principles'. If an alien died domiciled outside the U.S.S.R. his foreign assets would be distributed by foreign law. If he had been domiciled in the U.S.S.R. in theory Soviet law would be applied to all his assets, movable or immovable, but it is recognised that this could not be made effective in practice. An alien dying abroad would hardly be likely to own any assets in the U.S.S.R. other than bank deposits, for which special provision is made (323). The book does not enlarge on this last point but appears to refer to the practice of depositors in banks indicating nominees to take the balance on their death, which operates outside the law of succession (Soviet Civil Law textbook, 1947, p. 478). If a Soviet citizen died without successors the U.S.S.R. would claim his foreign assets. This provision has been embodied in various treaties.

The circumstances of Soviet foreign trade, with its Government monopoly, have prevented the question of enforcement of foreign judgments assuming much importance in the U.S.S.R. Most trade treaties provide for submission to arbitration, often to the Permanent Foreign Trade Arbitration Commission in Moscow which delivers reasoned judgments and appears to have developed a consistent and predictable practice (358, 360).

An important system of conflict of laws appears unlikely to develop in the U.S.S.R., either in internal inter-republican cases or in the rather stereotyped public trading cases involving truly foreign elements. But that the subject interests Russians appears from a significant sprinkling of modern books and articles (of which there is a bibliography at p. 31).

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BOOK REVIEWS

International Law and Human Rights. By H. Lauterpacht. [London : Stevens. 1950. xvi and 475 pp. £2 10s.]

In the Foreword to the second edition of his *International Law*, Professor Hyde points out that ' he has been forced to observe how States act, and may be expected to act, under certain conditions that confront them ; how fantastic and unscientific are statements or conclusions which ignore such expectations or probabilities ; and how unconvincing it is to the layman to hear proclaimed as the law rules which States under certain well-defined circumstances may be expected habitually to ignore. Such proclamations suggestive of preachments concerning what States should or should not do, shed little light on what they may at the time accept as correct standards of conduct to be respected as such '.

This warning against the commingling of *lex lata* and *lex ferenda* has been ignored by Professor Lauterpacht in his study of *International Law and Human Rights.* Thus, he states that ' fundamental rights are rights superior to the law of the sovereign State '. Further, there seems little point in telling laymen that under the Charter they enjoy certain fundamental human rights as a result of the unenforceable legal obligations imposed by the Charter on the States of which they are subjects ; particularly as Professor Lauterpacht himself points out, in his discussion of the unenforceable and non-binding Universal Declaration of Human Rights, ' There are no rights unless accompained by remedies. That correlation is not only an inescapable principle of juridical logic. Its absence connotes a fundamental and decisive ethical flaw in the structure and conception of the Declaration '. If this is true of the Declaration, it is even more true of the legally binding Charter.

The first part of Professor Lauterpacht's book is devoted to a philosophical study of human rights. Some seventy pages are concerned with ' The Subjects of the Law of Nations ', for the learned author seeks to prove that the individual is a subject of international law. There is a long account of all the various institutions, other than States, that may be regarded as subjects of international law. It is not obvious, however, how the legal personality of, for example, the United Nations proves anything with regard to the legal personality of the individual. Furthermore, it is submitted that the subjectivity of the individual is irrelevant from the point of view of his enjoyment of rights under international law. States, and any other existing subjects of international law, are fully competent to endow individuals with international personality, as,

for limited purposes, was done by the Central American States when they established the Central American Court of Justice.

Yet another seventy pages are devoted to a study of natural law and natural rights, and Professor Lauterpacht gives a number of instances of national constitutions which ostensibly guarantee such rights. Unfortunately, he has made no attempt to discuss the way in which these provisions work—or are ignored—in practice. Dr. Schwarzenberger has recently written a paper on 'The Protection of Human Rights in British State Practice' (1 *Current Legal Problems*, 1948), yet Professor Lauterpacht's analysis of the British attitude completely ignores British practice on the international plane. His chapter on 'The English Sources of the Doctrine of Fundamental Rights' is limited to English political and constitutional writings.

Professor Lauterpacht points out that the delegates at San Francisco specifically rejected any idea of incorporating into the Charter a clause guaranteeing the protection of human rights; nevertheless, he is one of those who considers that the Charter imposes legal obligations upon the Members of the United Nations with regard to the observance of human rights. It is submitted that it is only by special pleading that it is possible to discover any legal obligation to observe human rights in articles which merely refer to 'promoting and encouraging respect for human rights and for fundamental freedoms'.

Although Article 2 (7) of the Charter forbids 'intervention' in matters which are essentially within a State's domestic jurisdiction, unless the provisions concerning enforcement measures under Chapter VII of the Charter are invoked, Professor Lauterpacht considers that the General Assembly may safely discuss or make recommendations concerning human rights should it so desire, for such action, he contends, is not 'intervention'. It is true that 'intervention' is a legal term with a special meaning, but a glance at the *procès-verbaux* of the San Francisco Conference will show that the word was there used in a wider non-technical sense, while every attempt to embody a reference to international law into this paragraph was defeated. In its judgment concerning the *Legal Status of Eastern Greenland* (1933) the Permanent Court of International Justice pointed out that a party seeking to show that a word, the meaning of which is well known, is used in a special sense must bear the burden of proof (Series A/B, No. 53, p. 49). The same arguments should be applied in respect of Article 2 (7).

The learned author argues further that human rights have become a matter of international concern by virtue of the references in the Charter, and that, therefore, they cannot fall within the reservation of Article 2 (7).

In support of this Professor Lauterpacht cites the Permanent Court's Advisory Opinion on the *Nationality Decrees in Tunis and Morocco* (1923), but, in that Opinion, the Court pointed out 'that

the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render (the reservation of domestic jurisdiction) inapplicable' (Series B, No. 4, p. 26). It should be remembered in this connection that Professor Lauterpacht is of opinion that 'in the practice of the United Nations the terms "exclusively" and "essentially" have been treated as synonymous'. Finally, in case these arguments are rejected, the learned author contends that the reservation may be excluded as 'the correlation between peace and observance of fundamental human rights is now a generally recognised fact'. Professor Lauterpacht does not, however, suggest who is likely to threaten the maintenance of peace on behalf of Japanese in Australia, Russians in the Soviet Union, or negroes in South Africa, thus bringing the matter within the scope of Chapter VII of the Charter.

Professor Lauterpacht is so convinced of the significance of the articles in the Charter on human rights that he even reads the Charter into texts where it is completely irrelevant. In *Shelley* v. *Kraemer* (1948) the Supreme Court of the United States refused to enforce a restrictive covenant directed against Negroes. The court made no reference to the Charter and based its decision exclusively on the United States Constitution. Nevertheless, Professor Lauterpacht has no hesitation in saying of this and similar cases: 'No direct reference to the Charter was made in these decisions of the court, but it is probable that, apart from other factors, the inarticulate impact of the Charter was instrumental in prompting these revolutionary decisions'.

The book contains a useful analysis of the United Nations Commission on Human Rights and of its work. There is also Professor Lauterpacht's new draft Bill of Human Rights. With regard to the contents of the latter it is easy to agree to disagree, provided the Bill remains practical and feasible, and does not contain an exception clause so wide as to render every other article worthless.

Professor Lauterpacht has been extremely selective in his choice of literary references, and there is little mention of writers who disagree with his own analysis of the Charter. Similar arbitrariness is shown with regard to judicial decisions. Professor Lauterpacht cites one or two international judgments to show that the individual can enjoy rights and enjoy personality under international law. Only in passing, however, does he mention the *North American Dredging Co. Claim* (1926), in which the tribunal said: 'The Commission denies that the rules of international public law apply only to nations and that individuals cannot under any circumstances have a personal standing under it'. Perhaps it is not surprising that this case is only cursorily mentioned in connection with the subjects of international law, for, later in the award, the following passage appears: 'The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception

of inalienable rights of men and nations may have exercised a salutary influence, some 150 years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and cannot be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognised by nations and governments through their acts and statements, on the other hand. Inalienable rights have been like the policies of the Holy Alliance and Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace" (*Opinions of Commissioners*, 1927, p. 21, at p. 26).

L. C. GREEN.

Money in the Law, National and International. A comparative study in the borderline of law and economics. By ARTHUR NUSSBAUM. [Brooklyn: The Foundation Press, Inc. 1950. xxxii and 618 pp. $8.]

THE first edition of this book appeared in 1939 and was reviewed at length at (1940) 3 Mod.L.R. 247. It was then said, inter alia, that this was a momentous work containing such a wealth of thought and material that it was assured of a leading place in the legal literature of all nations.

These and similar descriptions are still more appropriate to the second edition, because the author has made many changes all of which are wholly welcome. The principal change lies in the fact that the work is now divided into two distinct parts, the first dealing with the law of money in general, and the second being devoted to money in public and private international law; this rectification which was indeed indispensable has enabled the author to eliminate much confusion which the earlier volume was bound to create. A second important change was made by including the interesting chapters on the legal history of the dollar in an Annex. Thirdly, public international law has received greater attention. The section on the effects of warfare and belligerent occupation has been enlarged and under the heading of International Co-operation five chapters have been added. Two of them deal with the International Monetary Fund; they include a particularly valuable discussion of Article VIII, ss. 2 (*b*) incorporated into the law of England by the Bretton Woods Agreements Order, 1946. Finally, the author has collected a great deal of fresh material and thus brought the work completely up to date; even the disastrous case of *Kahler* v. *Midland Bank* [1950] A.C. 24 is noted and commented upon by the remark: 'Common sense would have demanded the opposite decision' (p. 467).

To a large extent, therefore, the author is justified in stating in the Preface that this ' is practically a new book '. Perhaps this description is a little exaggerated, because, although the bottle is largely new, the wine is essentially old—but, let it be remembered, wine does not necessarily deteriorate as a result of age. In other words, the real and fundamental character is unchanged. On some points, it is true, the author has revised his earlier views and had regard to other writings. On the whole, however, he adheres to his own methods and his own ideas; perhaps this is also the explanation of the puzzling fact that such important expositions of monetary law as Dr. Martin Wolff has included in his *Private International Law* (1945) and Dr. Kahn-Freund has contributed to the sixth edition of *Dicey's Conflict of Laws* (1949) have been ignored. The reader will not treat it as an empty phrase when he is assured by the author (at p. iv) that ' this version will be final '.

Professor Nussbaum's work contains such a multitude of points inviting comment that the selection of the one or the other for discussion within the ambit of a review would inevitably be arbitrary. This reviewer, while recommending every student of monetary law to give his full attention to the work of a master of unrivalled experience and learning, prefers to add a few words of a more general character about the method of comparative research which is a feature of the book. Since the Preface to the first edition has not been reprinted in the second, the reader should be reminded that Professor Nussbaum aimed in 1939 and continues to aim in 1950 ' at analysing and determining the universal principles that underlie the law of money '. It is a matter for regret that the author has failed to abandon so ambitious a scheme which, it should be obvious, is incapable of realisation. If the author had employed the comparative method for the purpose of presenting and illuminating American law, he would probably have avoided the danger of occasionally misstating the non-American law; thus, to mention only two instances, at p. 21 the author overlooks the decision of the House of Lords in *Perrin* v. *Morgan* [1943] A.C. 399, and therefore misrepresents English law, and at p. 326 it is said that if a bank in carrying out its client's order has acquired a credit with a foreign bank, ' a distinct and identifiable " res " has come into existence which should be reserved, under Anglo-American law, as a quasi-trust fund for the client ', though in England *Aschkenasy* v. *Midland Bank* (1934) 51 T.L.R. 34 (C.A.) and *Banque des Marchands de Moscou* v. *Rabeneck* (1949) 83 Ll.L.R. (H.L.) necessitate the opposite conclusion. Another noteworthy aspect of Professor Nussbaum's comparative method lies in his tendency to impute motives to foreign courts which cannot be proved—and to a lawyer a guess, however shrewd it may be, should not be the same as proof. At p. iv Professor Nussbaum draws attention to the undeniable fact that decisions on questions of monetary

law often have grave financial and political consequences, and continues :

> ' In this situation the question frequently arises whether an opinion of a court, though ostensibly proceeding on an objective legal theory, in reality means a discrimination against foreign creditors or debtors. It is here where comparative analysis proves most fruitful, owing to the similarity of fact situations. Unfortunately the results are disappointing. The highest courts of the countries under consideration have far too sadly failed on this score. Apparently we are confronted with an immanent limitation of judicial objectivity. Patriotism, perhaps patriotism misunderstood, may conflict with the exigencies of straightforward legal thinking.'

He proceeds to say that the application of the doctrine of public policy would be unobjectionable, but

> ' unfortunately English, and to a lesser extent, American courts are unwilling to use the public policy concept on the ground that it infuses quasi-political elements into judicial reasoning. . . . Courts afraid of the public policy argument nevertheless feel the necessity not to apply the foreign law contrary to vital national interests. In order to arrive at the desired result they will then employ utterly specious arguments or pretexts. Great damage to the prestige of the courts is the inevitable result. Insincerity though subconscious is far too high a price for shunning the public policy principle '.

From this point of view the author condemns at least three decisions of the House of Lords and also decisions of many other supreme tribunals. In some of these cases Professor Nussbaum's suspicions may very well be justified (though they are certainly unfounded at pp. 398 *sqq.* where he castigates the French Cour de Cassation for quite rightly refusing to turn a mere option of collection into an option of payment). But whether they are justified or not, it is submitted that the comparative lawyer is called upon to treat his material with a degree of restraint which in this volume is not always conspicuous.

F. A. MANN.[1]

Law Reports of Trials of War Criminals. Vols. 14–15. [London : Published for the United Nations War Crimes Commission by His Majesty's Stationery Office. 1949. 5s. each.]

THESE volumes conclude the series of fifteen which give a selection of war crimes trials. The present reviewer need not repeat the criticisms of editorial policy which have been made by Mr. Heuston in a review (3 I.L.Q. 307) of two earlier volumes in this series. It

[1] LL.D. (Lond.), Solicitor.

is, however, only fair to state that wherever the reader is tempted to question the adequacy of a report of a particular trial, he generally finds that the accompanying notes draw attention to the more important omissions.

Volume 14 deals with seven cases with very differing facts and background. Only a short summary can therefore be given here. The first case is the trial of *Takashi Sakai*, a Japanese military commander in China during the war of 1939–45. The accused was charged with crimes against the peace, war crimes and crimes against humanity. He was found guilty and sentenced to death. The Chinese War Crimes Military Tribunal which reached this conclusion appear to have followed well-established precedents in holding that the accused could not escape liability for atrocities committed by his subordinates, provided that he knew or ought to have known of them, and took no measures to prevent them. On the other hand, in finding the accused guilty of crimes against the peace, the tribunal appears to have based its decision on an excessively wide principle, namely, that anyone who conducts military operations in a war of aggression is guilty of a crime against the peace. The trial of *Eisenträger and Others* concerned a group of Germans working in the Far East as an intelligence unit of the German High Command. After the German Armistice the accused individually entered into agreements with the Japanese and continued to give the Japanese assistance by propaganda and intelligence reports in the war between Japan and the Allies. In finding twenty-one of the twenty-seven guilty, and in sentencing them to terms of imprisonment up to life imprisonment in the case of *Eisenträger*, a United States military commission at Shanghai gave an extended, though it would seem reasonable, definition of a war crime committed by breaking the terms of an armistice. A war crime in this sense may apparently be committed not merely by a member of the armed forces but also by civilians (as were the accused in this case); and engaging in 'military activities' contrary to the terms of an armistice includes inter alia giving information to, preparing propaganda for, or generally encouraging one's own nationals to support, a Power still at war with the other party to the armistice. The trial of *Buhler*, deputy to *Hans Frank*, Governor-General of Poland during the German occupation, by the Supreme National Tribunal of Poland for war crimes and crimes against humanity, although reported at length, does not offer many points of purely legal interest. But *Buhler* was also charged with being a member of a criminal organisation, namely, the German occupation authority in Poland. This extension of the legally obscure finding of the Nüremberg tribunal with regard to the S.S. is a melancholy application of a dangerous principle of corporate criminal responsibility, and no less objectionable in spite of the fact that the accused in this particular case was obviously without merits. Perhaps the most interesting case in the volume, and an illustration of the impartiality of Norwegian

criminal justice, is the trial of *Latza and Others*. Following the killing of a Quisling chief of police in Norway, the accused were appointed judges of a summary court which proceeded on the same day as the killing to sentence a number of prominent Norwegians to death. After two trials before the Lagmannsrett and two appeals to the Supreme Court, the latter finally acquitted all the accused after a most careful examination of the meaning of a 'fair trial' in an occupied country. The discussions in the various courts are reported at length and should make a valuable contribution to international law. The trial of *Hangobl*, a member of a civilian defence organisation in Austria, who shot and killed a United States airman who had baled out of his aircraft and landed in Austrian territory, is too short to provide much legal interest. The question, however, of the correct behaviour towards a descending enemy airman in times of war is an interesting and a difficult one, and in finding the accused guilty of a violation of the laws of war, it is to be regretted that the American general military court did not more clearly state its reasons. A very full report of the trial of *Rauter*, an S.S. leader in the German forces occupying Holland, before the Netherlands Special Court and Special Court of Cassation, contains much interesting discussion of war crimes and crimes against humanity. More particularly, however, it is important for the ruling that reprisals, at any rate a death sentence, can never be carried out against innocent nationals of an occupied country, and for a very full and, it is submitted, convincing refutation of the defence that the maxim '*nulla pœna sine lege*' should prevent the conviction of individuals for war crimes and, in particular, for crimes against humanity :—

> 'This principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned.
>
> 'These latter interests do not tolerate that extremely serious violations of the generally accepted principles of international law, the criminal . . . character of which was already established beyond doubt at the time they were committed, should not be considered punishable on the sole ground that a previous threat of punishment was lacking.'

Finally, there is the trial of *Zuehlke* before the Netherlands Special Court in Amsterdam and the Netherlands Special Court of Cassation. The accused was a former German prison warder and member of the *Waffen-S.S.*, who was in command of the guards at Dutch prisons in Holland from 1941 to 1944. He was charged and found guilty of taking part in the persecution of the Jews by illegally detaining and ill-treating them and of taking part in systematic terrorism and brutality by ill-treating prisoners in general, such offences being described as war-crimes and/or crimes against humanity, as defined by Article 6 (a) and (b) of the Nüremberg Charter. In sharp contrast

to the Polish court in the trial of *Buhler*, which has been discussed above, the Court of Cassation refused to extend the principle of collective guilt admitted by the International Tribunal at Nüremberg with regard to certain organisations. On the contrary, it regarded *Zuehlke's* membership of the S.S. as only ' a circumstance under which the others acts were committed '. On the other hand, the Court of Cassation had no doubt that the accused's detention of Jewish prisoners constituted a crime against humanity, ' namely, . . . other inhumane acts committed against any civilian population before or during the war '. While finding the charge not proved on the facts, it was prepared to assert that to refuse to allow spiritual assistance to someone under sentence of death would constitute both a war crime and a crime against humanity.

The court considered at length the defence of superior orders, as the Netherlands provisions concerning war crimes did not adopt Article 8 of the Nüremberg Charter which provides that ' the fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires '. Both the court of first instance and the Court of Cassation did not consider that this rule represented international law, although they found that on the facts the accused had not been subject to any duress. As the editor of the volume under review points out, such a view of international law is probably a minority one. Nor can it be said that, in a sphere where it is difficult to fix individual responsibility, it is desirable to provide too easy a method of escaping responsibility, provided that punishment can be suitably mitigated.

Volume 15 of the series does not contain any further reports of trials, but, after a valuable foreword by Lord Wright, consists of a systematic summary of the principles of law deducible from all the cases reported in the series. This most important work has been done by Mr. Brand, the editor of the series of reports. Lord Wright, in pointing out the difference between municipal law and international law, warns English common lawyers in particular that they must not expect to find the sources of international law entirely in decided cases or international treaties. Speaking of the Hague Convention, he boldly admits that such agreements cannot cover all cases, and cites the provision whereby ' the inhabitants and the belligerents remain under the protection and governance of the principle of the Law of Nations, derived from the usages established among civilised people, from the laws of humanity, and from the dictates of the public conscience '. Lord Wright considers, and an examination of Mr. Brand's summary supports his opinion, that the war crimes trials, taken as a whole, have given practical expression and legal form to what might, in another age, be called the law of nature. The latter Lord Wright prefers to define as ' the law which aims, however imperfectly, at giving effect to the sense of justice and of

right and wrong and which is naturally inherent in all human beings, except only the abandoned and vicious '. Statistical illustration of the extent to which the war crimes trials have put into concrete propositions this law of nature, is shown by the figures cited by Lord Wright. Approximately 1,900 reports of trials were received by the United War Crimes Commission, some 89 have been reported and a further 92 cited. The latter figures may not seem very considerable in relation to the scope and horrors of the late war, but it must be borne in mind that the Nüremberg and Tokyo Tribunals are not taken into account, and that some of the trials reported, including several in the volume which has been reviewed above, have proved of real importance in the elucidation of international law.

The digest of reported cases compiled by Mr. Brand is a rich source of comment on international law and of factual applications of its principles. The digest is arranged under the following heads :— sources of international criminal law, legal basis of courts administering international criminal law, parties to crimes, types of victims, types of offences, defences, court procedure and punishment.

Particularly interesting is the treatment of crimes against humanity (p. 134), and the discussion (p. 161) of the sometimes very plausible plea that the alleged offence was carried out as a judicial act; English constitutional lawyers may be interested in the international application of the principles of ' natural justice ' to trials. Even where the principles of international law are fairly clear, as for example, with regard to the proper treatment of the inhabitants of occupied territories, the war crimes trials provide many clarifying illustrations. It is to be hoped that English lawyers, whose studies may not normally take them to the field of international law and who may be somewhat sceptical about its authority, will at least peruse Mr Brand's remarkable digest of cases. They will find there a body of case law which, even if it never has to be applied to another unhappy calendar of war crimes, should be of permanent importance in the development of international law as a whole.

NORMAN S. MARSH.[1]

Private International Law. Second Edition. By MARTIN WOLFF. [Oxford: Clarendon Press. 1950. xlvii and 631 pp. £1 15s. net.]

THE first edition of Dr. Wolff's *Private International Law* was published in 1945. The work was very soon recognised as a quite outstanding contribution to the literature on the subject. In presenting his treatise the author was able to draw upon a perhaps unequalled knowledge of the private international law rules of

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European countries, and, when necessary, the domestic laws of continental countries. He was able to do what an English lawyer —owing to the doubtful propriety of the habit in his own particular domestic field—is, even if adequately erudite, loth to do even in the conflicts field: that is to attempt to fill in the many gaps which exist in this branch of law by reference to principle and doctrine, by resort to analogy and by use of the comparative method. This aspect of Dr. Wolff's work was reflected not only in the mode of treatment of recognised problems, but also in the catholicity of his selection of problems for treatment. In *Private International Law* the author presented to the English-reading world his mature and considered conclusions, reached after years of precise scholarship, on the problems with which the subject abounds. This quality of maturity which characterised the first edition would have ruled out any possibility of a need arising for a second edition, certainly so soon as 1950, were it not for the rapidity of contemporary development in the English conflict of laws.

In the circumstances, it is not surprising that the most important changes embodied in the new edition result from new decisions and statutory enactments. The author has not thought it necessary to write even a new preface. However, although the primary purpose of this edition is simply to bring the work up to date, Dr. Wolff has taken the opportunity to effect some slight rearrangement of subject-matter, to make its classification more familiar to the English reader, to remedy some minor errors and to modify a few conclusions.

The main improvement in classification lies in the division of the book into chapters (numbering one to forty-two). The overall divisions of the work into seven parts and into 585 sections are retained. The section numbers printed in the margin are now conveniently in heavy type. Another improvement is that the index, table of cases (no longer in italics) and list of statutes make reference to page not section numbers. It is, in the opinion of the reviewer, a pity that rationalisation and simplification of the sub-classifications was not undertaken. It is confusing for instance, to take one example, that in Chapter VI the first sub-classification is by means of Arabic numerals, whereas in Chapter IX it is by means of Roman numerals (I–IV), I, II, and III being sub-headings, and IV in the same series being placed (in a different sized type) in the body of the text. Moreover, the prolific use of sub-classifications sometimes in Roman, sometimes in Arabic numerals, in varying sizes and types of print, sometimes as part of the text and sometimes as sub-headings (these latter being interspersed with some unnumbered sub-headings), and cutting across the overall classification into sections, tends, even if the sub-classifications are made internally self-consistent, to bewilder rather than to clarify.

The division of the book into chapters has sometimes been accompanied by a rearrangement of titles. This is notably the case in Part II (Chapters IV–VI) dealing with Jurisdiction of the English Courts, and in Part VII (Chapters XXXVIII–XLII) dealing with Succession upon Death.

Reference may perhaps be made to a few instances of Dr. Wolff's incorporation into his work of recent developments in the law.

In his treatment of the problem of the place of the tort, Dr. Wolff is now able to cite *Munro* v. *American Cyanamid and Chemical Corporation*,[1] in support of his view that English courts would accept the theory of the place of the action rather than any other doctrine. The more recent decision in *Bata* v. *Bata*[2] is mentioned (and doubted) only in an addendum.[3] That the treatment of this whole topic is inadequate, is not, owing to the lateness of this decision, entirely the author's fault. But quite apart from this, it does seem that scant consideration is given to the merits of the views put forward by the late W. W. Cook. The possibility of the optimum solution being found in a modification of Cook's suggested rule, by a limitation of the choice he allows to the plaintiff, to countries which have a *substantial* connection with the commission of the tort, is not even hinted at. Even if the Cook approach is rejected, Wolff's preference for the place of the action theory based as it is on the fact that ' all an English court wants to learn from the lex loci delicti is whether the defendant's behaviour is or is not justifiable. Only the law of the place at which the defendant acted is competent to characterise his behaviour '[4] is questionable. That this reasoning is made to appear plausible is yet another[5] unhappy result of Willes J.'s unfortunate (although in the instant case not inappropriate) language in *Phillips* v. *Eyre*.[6] If ' not justifiable ' is taken to mean simply ' tortious ', it becomes clear that the reason for which reference is made to the lex loci delicti (*i.e.*, to find out whether the defendant's behaviour is tortious) does not necessarily predicate that the locus must be the place of the action. If the essence of tort is compensation for wrongful injury, it might well be that the locus is the place where the injury is first received.

The author refers to the decision in *de Reneville* v. *de Reneville*[7] in the course of his discussion of three different problems : domicile of a married woman, the essential validity of marriage, and jurisdiction in nullity proceedings. In the first context he criticises the rule that a void marriage does not have the effect of giving a woman the domicile of her husband : ' if it is permissible to disregard that retroactivity [*i.e.*, of a nullity decree] with regard to the

[1] [1944] K.B. 432.
[2] [1948] W.N. 366.
[3] At. p. 610.
[4] At. pp. 494–5.
[5] See, too, its implications in *Machado* v. *Fontes* [1897] 2 Q.B. 231.
[6] (1870) L.R. 6 Q.B. 1 at p. 28.
[7] [1948] P. 100.

wife's domicile in cases of voidable marriages, it should be equally permissible to disregard it for void marriages '.[8] The adoption of this suggestion would, it is submitted, make nonsense in practice of the definition of a void marriage as ' one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so regarded by both parties to it without the necessity of any decree annulling it '.[9] The solution must be more drastic. It must take a form implicit in Dr. Wolff's relating of the ' highly unsatisfactory ' differentiation between void and voidable marriages on this point, to the failure of English law to retain the general distinction between void and non-existent marriages.[10] Rather than attribute to void marriages particular characteristics of the voidable marriage which would in practice negative the hall-mark of the void marriage, we should classify as ' voidable ' virtually all marriages in which there has been some sort of ceremony, that is to say, all cases in which there is a prima facie presumption of the existence of the marriage. Where there is no such presumption the marriage would be more properly classified as non-existent.

Dr. Wolff rejects the view that the essential validity of a marriage is governed either by the law of the intended matrimonial home or by the law of the pre-marriage domicile of the husband. Whatever the merits of his arguments from the point of view of principle and policy, it can scarcely be said that in weighing authority he pays due attention to the unequivocal statement, which forms part of Lord Greene M.R.'s ratio in the *de Reneville Case*, that it is one of these laws, preferably in Lord Greene's view the former, which governs.

The author's treatment of the effects of the *de Reneville* decision on the law relating to nullity of marriage, is, in the opinion of the reviewer, disappointing. Little attention is paid to the reasoning which led the Court of Appeal to determine the void or voidable nature of the marriage by reference to French law. Nor is consideration given to any effects on the choice of law problem, which this prejudging of the issue at the jurisdiction stage may have. Dr. Wolff's lack of interest in these questions is of course perfectly consistent with his more basic criticism of the *de Reneville* decision in connection with the effects of a void marriage on a woman's domicile. If, as Dr. Wolff would have preferred, the Court of Appeal had held that she acquires the domicile of her husband, the court would not have had to consider at the jurisdiction stage the void or voidable nature of the marriage; for in neither case would it, on the facts of the *de Reneville Case*, have had jurisdiction to hear the petition.

In his first edition Dr. Wolff argued with great force that

[8] At. p. 122.
[9] *Per* Lord Greene M.R. [1948] P. 100 at p. 111.
[10] At p. 121; see, too, pp. 79–81.

legitimacy is governed by the law of the domicile of origin, which is generally the law of the father's domicile. The subsequent decision of *Re Bischoffsheim*[11] has given some colour to the view that this is in fact the English rule. The author's reconciliation of Romer J.'s decision in this case with the decision of the House of Lords in *Shaw* v. *Gould*,[12] however ingenious, appears strained. *Shaw* v. *Gould*, Dr. Wolff maintains, fell within the one exception to the general rule which he advocates. This exception covers 'cases where the recognition by the English court of the validity of the marriage would involve a violation of the principles of justice. In such cases the English court under its own conflict rule treats the marriage as void and therefore denies the legitimacy of the child'.[13] In *Shaw* v. *Gould* legitimacy depended, says Dr. Wolff, on the law of Scotland qua law of Shaw's domicile. By that law legitimacy depends on birth in lawful wedlock. Although owing to the validity of the previous divorce by Scots law, the wedlock was 'lawful' by that law, it would be 'particularly repugnant to English principles of justice owing to the circumstances in which the decree was obtained'[14] for an English forum to recognise the remote consequences of the decree.

Dr. Wolff's contention that reference was made to the law of Scotland as the law of the father's domicile and thus the law governing the question of legitimacy, is hardly compatible with the judgments of their Lordships in *Shaw* v. *Gould*. Moreover, it is difficult to see why, if reference was made in this way to the law of Scotland, an English court should recoil from applying the whole law of Scotland. Legitimacy by Scots law involves birth in 'lawful' wedlock. What consideration of policy enables an English forum, purporting to apply the law of Scotland, to revert back to English domestic law for the determination of this one incidental issue—the lawfulness of the wedlock? This question is particularly pertinent when it is remembered that the result of this intervention on 'policy' grounds was, in Dr. Wolff's own words, 'under the circumstances of the case . . . particularly unsatisfactory'.

Criticisms such as these are trifling when regarded against the background of the scope and merit of the treatise under review. In fact, it is particularly significant that the author's failure to pay due attention to judicial decisions and dicta, as, for example, to Lord Greene M.R.'s pronouncement on the law governing the essential validity of marriage, or to his differentiation between the effects of void and voidable marriages on the domicile of the woman, or to the true ratio of *Shaw* v. *Gould*, although obviously a serious defect in any statement of what the law is, represents in each case

[11] [1948] Ch. 79.
[12] (1868) L.R. 3 H.L.Cas. 55.
[13] At p. 386.
[14] At p. 388.

an adherence to a principle, the desirability of which will be readily conceded even by most of Dr. Wolff's critics on this score. Dr. Wolff's detection of sound principle is masterly to the point of being almost uncanny. At the same time his inhibitions about disregarding decisions which run contrary to principle, are less deep-rooted than those of his English colleagues. It is for these reasons that his work may well be destined to have an exceptionally enduring quality: and it is for these reasons, that the present reviewer asserts, respectfully but unhesitatingly, that it is one of the greatest treatises on the conflict of laws that has been written in the English language.

P. B. Carter.[15]

Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States. [United Nations General Assembly, International Law Commission, Lake Success, New York. 1948.]

This most useful study has been prepared by the Secretariat of the United Nations. On September 21, 1947, the General Assembly instructed the Secretary-General to start preparatory work on matters concerning the International Law Commission, and, in particular, to undertake such work with regard to a Draft Declaration of the Rights and Duties of States. As is pointed out in the introductory note to this study, the subject of the rights and duties of States is, in fact, the entire (or, as we should prefer to state it, at present the most important) domain of international law. The immediate cause of this ambitious undertaking has been the suggestion of several governments that such a declaration of rights and duties of States should be included in the Charter of the United Nations. The Republic of Panama presented a draft declaration for consideration of the General Assembly at its first session. The member States of the United Nations were requested to send their observations on the draft declaration. That the response was somewhat limited is perhaps not surprising as any Foreign Office might well be daunted at the thought of making adequate comment on a statement of the greater part of international law expressed in twenty-four short propositions. It would seem indeed superfluous to state that some of the propositions are so vague as to be of little practical guidance, and that others are misleading or simply untrue. For example, as the United Kingdom pointed out, Article 7, which states that ' foreigners may not claim rights different from, or more extensive than, those enjoyed by nationals ', ignores the whole conception of a minimum international standard with which States are obliged to comply in their treatment of foreigners. The value of

[15] Fellow of Wadham College, Oxford.

this work lies, however, not in the actual terms of any draft code but in the useful survey of attempts in and prior to the United Nations to construct such a draft declaration. Whether these attempts were themselves worth the expenditure of time, effort and money involved, is perhaps another question.

NORMAN S. MARSH.

The Export Trade. A Manual of Law and Practice. By CLIVE M. SCHMITTHOFF. Second Edition. [London : Stevens & Sons. 1950. 393 pp. 25s.]

POLITICAL and economic conditions in the international field today have inevitably added to the large number of complicated legal problems which are encountered by those—whether they be manufacturer, merchant, banker, insurer, shipping agent, carrier, broker, or legal adviser to any of these—whose activities bring them into contact with one or other of the far-reaching ramifications of the export trade. In presenting what appears to be the first comprehensive manual covering the wide range of legal topics encountered in modern international commerce, this book, as even a cursory examination shows, has filled an obvious need in our legal literature, which alone must assure it of a wide and warm welcome. As an introduction to, and a detailed and careful survey of all aspects of our law dealing with the practical problems of selling goods in overseas markets, it cannot be described as anything short of admirable.

Its strength—one is almost tempted to say its originality—however, goes further than being merely a well-written and eminently readable exposition of the law of international commerce *in abstracto*. Above all, it is remarkable in its unwavering emphasis on the practical methods of making the law the servant of the person for whom the book is written : the exporter. More than a legal treatise, it succeeds in being a work of practical legal advice, aimed throughout at the prevention of legal complications and economic losses to the exporter, to whom the law is not only explained simply and clearly, but who is advised, at each step, how to make the most practical use of its provisions.

It is impossible here to do justice to the wide range of subjects discussed by the author or to give more than the briefest outline of the contents of the book. The first part deals with the contract between the seller in England and the buyer overseas. Apart from providing a useful summary of the law of sale of goods as a whole, the various types of agreements—c.i.f., 'ex-works', f.o.b., 'ex-ship', and others—are compared and contrasted, and the relative commercial merits of each, from the exporter's point of view, are clearly brought out. More useful still—and unusual in a textbook—is the detailed analysis of each of the more important clauses—

whether they relate to *force majeure*, choice of law, arbitration, the rights of the unpaid seller or others—which an exporter would be well advised to insert in his conditions of sale in order to avoid those constant dangers and pitfalls which are the daily concern of solicitors and barristers specialising in commercial matters, but of which the unhappy exporter too often only becomes aware ' after the event '. By taking the author's advice and combining the highest degree of legal safety as far as is compatible with commercial practicability, the exporter will go a long way towards mitigating that danger which must be a constant spectre to him : loss of control over the goods without adequate redress against the foreign buyer.

The second part discusses in great detail, and again from an entirely practical angle, the problems of the exporter's representative in the country of import. The merits and disadvantages of exclusive sales agreements with a foreign company, of contracts with the various types of independent agents abroad, of the establishment of an overseas branch office or of the formation of a subsidiary company, and the terms of these various contracts are each carefully analysed, and the seller's attention is particularly drawn to the restrictions which the law of the country of import, or the dangers of double taxation, may place in his path. The advantages of joining one of the export groups or joint selling organisations under the auspices of the Board of Trade are explained, and a list of the addresses of all these bodies in the United Kingdom appears in one of the appendices.

Next, three vital topics are discussed in detail and with careful reference to legal as well as to commercial practice. First, the numerous means of financing exports—by payments on open account or bills of exchange, by the various types of bankers' commercial credits or by the negotiation of bills by the exporter—are analysed, including the facilities obtainable from the Export Credits Guarantee Department of the Board of Trade, which allows the exporter to cover himself against unforeseen contingencies against which he cannot normally insure. Secondly, the law and practice relating to all aspects of marine insurance is presented clearly and comprehensively, and, finally, all the major questions relating to the actual carriage of the goods abroad, by sea or air, are discussed in great detail. The shipper's liability under bills of lading and air consignment notes, and the payment of freight, are exhaustively treated, and two further chapters, dealing respectively with the protection of patents and trade marks abroad and with arbitration and litigation involving a foreign party, are also included.

Finally, the author reviews comprehensively the wide field of government regulations affecting exports. The value of this survey, which appears never before to have been attempted in a textbook in this country, is obvious. In order to discover his legal position with regard to such matters as export licences, exchange control, Customs regulations and the relief which may be obtained from purchase tax,

an exporter would formerly have had to consult a multitude of different legal, commercial or government publications, each telling him either too much or too little to be easily comprehensible as a whole. The book is concluded by a series of informative and useful appendices, which set out the text of the most important provisions of the law relating to insurance, carriage of goods by sea or air, export licences and exchange control with which the exporter should be familiar, as well as a list of addresses of departments or organisations in the United Kingdom from whom further information may be obtained.

From the point of view of the commercial barrister this book, inevitably, attempts no more than to survey the field of international trade as a whole; for abstruse and technical legal problems specialised works must still be consulted. But if it were otherwise this book would have failed in its object: to provide in simple language a comprehensive treatment of all aspects of the law relating to the sale of goods overseas, and at the same time of giving to the exporter, with all the details which are necessary, the answer to almost every question which he is likely to encounter, and invaluable advice as to the means of transporting and disposing of his goods as cheaply and safely as the law makes it possible. From this point of view, the value of this remarkable work cannot be rated too highly, and it is difficult to do justice to its qualities in a short review.

NEVILLE LASKI.[1]

Matrimonios Españoles ante Tribunales Franceses. By ERNST MEZGER and JACQUES MAURY. [Madrid: Instituto de Estudios Politicos. 1949. 59 pp.]

THE Madrid 'Instituto de Estudios Politicos' has published two interesting articles by foreign lawyers relating to the effect of Spanish marriages in France. These articles are entitled 'Spanish Matrimonial Law in the French Courts' by Ernst Mezger, who is a German lawyer and a Graduate of the Institute of Comparative Legislation of Paris, and 'Spanish Civil Marriages contracted in Spain (not in the Nationalist Zone) after the Law of 12th March, 1938, of the Nationalist Government, and their Validity in France', by Maitre Jacques Maury, Dean of the Faculty of Law of the University of Toulouse.

The first deals objectively with four cases that have arisen in the French courts. The first relates to a Spanish woman, whose maiden name was Perez, who in 1934 married a Frenchman in France. By Article 23 of the Spanish Republican Constitution it was envisaged (I advisedly put it no higher), that a Spanish woman

[1] K.C., Master of the Bench of the Inner Temple.

marrying a foreigner should not lose her Spanish nationality unless an express Declaration of Renunciation were executed. By the French law of August 10, 1927, it is provided that a foreign woman marrying a Frenchman does not lose her nationality of origin, unless it be by express declaration, or unless by the law of her country of origin marriage to a Frenchman implies loss of her original nationality.

Señorita Perez had not made any declaration, and therefore, theoretically at least, she had retained Spanish nationality.

Subsequently two Spanish enactments were passed, namely, the Decrees of May 24, 1938, and November 9, 1939, which confirmed as binding Article 22 of the Spanish Civil Code, namely that a Spanish woman marrying a foreigner loses her Spanish nationality and acquires the nationality of her husband.

Señorita Perez alleged that she had been deprived of her Spanish nationality by the retrospective re-introduction of Article 22 of the Civil Code, and she demanded that the French authorities should likewise consider her as of French nationality at the date of her marriage, that is to say that they should consider her as a French national with retrospective effect to that date.

The Civil Tribunal of Montpellier refused, in a judgment dated March 24, 1941, on the grounds that it could not recognise the retrospective effect of any Spanish legislation, which had indirectly any bearing on the acquisition of French nationality. Such acquisition is governed by stable and fixed laws, and cannot be affected by changing foreign legislation.

The author finds considerable criticism for the judgment, mainly on the grounds that the practical effect is to make the woman stateless. He refers to various provisions of French law which enable subsequent declarations later made, as are for instance the Vichy law of May 22, 1944, since repealed, and the law of May 24, 1946, which provided for naturalisation after one year of residence in France for women in the position of Señorita Perez, providing application is made before December 31, 1947.

Whilst I sympathise with the author's criticisms of the judgment in my opinion the real fault lies in attributing retrospective effect to the Decrees of May 24, 1938, and November 9, 1939, which, it is said, in turn gave retrospective effect to Article 22 of the Civil Code. This is a complete fallacy, because Article 22 of the Civil Code never had been abrogated. It was in fact in full force in 1934, at the date of the marriage; and the Decree of November 9, 1939, does no more than to confirm expressly that during the period of the Republican Constitution Article 22 of the Civil Code was in fact in full force. Article 23 of the Republican Constitution did no more than to outline or forecast certain legislation which was to follow, some of which did in fact follow and some of which did not. Article 23 was never intended in itself to be substantive law.

The second case refers to Señor and Señora Garcia-Fuentes, who

were married in Paris both by the Catholic Church and by the Civil Registry. The wife sought a judicial separation in France, and invoked Articles 105, 107 and 108 of the Spanish Civil Code in support. The court of first instance declined jurisdiction on the ground that under Article 80 of the Spanish Civil Code only ecclesiastical courts can deal with matrimonial causes in cases where there has been a religious ceremony; but the court of cassation on January 9, 1943, reversed the judgment. The grounds were: (1) that by Spanish law all civil questions appertain exclusively to the civil courts; (2) that French law considers this case as a matter of procedure and therefore applies the 'lex fori'; (3) that a civil marriage contracted in France by persons domiciled in France is within the competence of the French courts; and (4) that to decline jurisdiction would render it impossible for the wife to apply for separation anywhere, to which she is entitled not only under French law but under Spanish law as well.

The author refers to criticism of the judgment by Professor Niboyet and other eminent jurists, and comes to the conclusion that it is correct, and not in conflict with the earlier judgment of 1905 which respects the 'lex patriae' in all substantive matters, as opposed to procedural matters. He adds that in his opinion a French court would declare itself as having no jurisdiction where the 'lex patriae' provides that, as a matter of procedure, the courts of the nation to which the parties belong alone are competent to deal with the matter.

The respect of the French courts for the 'lex patriae' in all questions of status and capacity is evidenced afresh in the *Galvez Case*. Galvez was a Spanish Republican refugee, who in 1945 was granted the same rights by the French Government as were given to the Russian refugee by the International Convention of October 28, 1933. Under that Convention the personal statute of the refugees is deemed to be not the 'lex patriae' but the 'lex domicilii', or even the law of their place of residence. The court of first instance refused a divorce on the grounds that the 'lex patriae', *i.e.*, the law of Spain did not recognise divorce; the court held that the Convention applied to stateless persons and not to refugees who have not lost their nationality. The Paris Court of Appeal reversed the judgment (December 6, 1947) on the ground that the inferior court had misconstrued the Convention, and that under the Convention the status and capacity of this particular refugee was to be governed by French law. This decision, Mezger observes, confirms the traditional French consideration for the 'lex patriae' of the 'de cujus'. I agree.

The fourth case was one in which a civil marriage took place in Barcelona in 1938, under the Republican laws in force, but contrary to the law of June 23, 1938, of the Nationalist Government, which repealed the Republican Civil Marriage Law of 1932 and re-established civil marriage as provided by the Civil Code. The parties

had moved to France, and in due course the husband, one Guerra, was killed in an accident at his place of employment. The widow claimed compensation as such against her husband's employer, and against an insurance company, and the question arose as to whether she had or had not been his legal wife. After many hearings in various courts it was finally held that she was not. The real ground being that recognition of the Franco Government implies retrospective recognition of all the laws and enactments of such a government, and that it was immaterial that the marriage was valid under the existing Republican legislation.

Jacques Maury's article is a study of the problems raised in the last case referred to by Mezger, that is to say, what law is the French court to look to, the law of the Republic or the law of the Franco Government. He examines the evolution of the civil marriage laws in Spain, which culminate in the law of March 12, 1938; this provides that the only civil marriage permitted is that authorised by the Civil Code, that is to say for persons who expressly declare that they do not profess the Roman Catholic faith.

What is the position in regard to civil marriages celebrated during the Civil War in non-Nationalist territories, for instance in Barcelona in 1938?

Maury comes to the conclusion that the only law for which the French courts can have regard is the law of the Franco Government. He reaches this conclusion firstly on the point that all legislation of a recognised government must be deemed to be recognised retrospectively by a recognising State. His second and favourite argument is that the French court must look to the foreign law as it is in fact, not as it was; and therefore, he argues, it is not necessary to consider whether recognition has retrospective effect or not. This second argument is, of course, no more than the logical consequence of the first.

I myself have met a very great number of cases, many of them tragic, arising out of the difficult position that arose as regards marriage as a result of the conflicting laws within Spain herself at that period. It is unquestionable to me, and I have always so advised, that any civil marriage contracted anywhere in Spain after March 12, 1938, is invalid unless (a) the parties expressly renounced the Roman Catholic faith; and (b) the municipal judge performs the ceremony (articles 42, 100 and 101 of the Spanish Civil Code). It is a popular and widespread fallacy that the Franco Government declared null and void all civil marriages. That is, of course, pure nonsense. What in fact occurred is that 'marriages' performed during the Civil War by political commissars or 'popular judges', of which there were many thousands and which were not valid under the Republican regime itself, have been expunged from the civil registries, but all civil marriages performed in Spain up to March 12, 1938, in accordance with the Civil Marriage Law of 1932 subsist, as

do all such marriages contracted after that date in accordance with the provisions of the Civil Code.

Up to the present time there has been no case, to my knowledge, in the English courts dealing specifically with these marriages of Spaniards during and after the Civil War. It is quite clear, however, that they would follow the same lines as the French courts, not only because the local form is the test (*Berthiaume* v. *Dastous* [1930] A. C. 79; *Ogden* v. *Ogden* [1908] P. 46, etc.), but also because recognition of a Government is retrospective (*Luther* v. *Sagor* [1921] 3 K. B. 432; *The Jupiter* [1927] P. 122, 250; *Bank of Ethiopia* v. *National Bank of Egypt* (1937) 53 T. L. R. 751).

RAFAEL VALLS.[1]

Sistema y Filosofia del Derecho Internacional Privado con especial consideración del Derecho Internacional Privado Español. Tomo II. By WERNER GOLDSCHMIDT. [Barcelona, Bosch. 1949. xiv and 576 pp. 100 pesetas.]

IN the first volume of this treatise [2] the author developed his views on the nature and the general problems of Private International Law. A vivid interest in theory and a strong leaning towards logical systematisation were its principal features. Reliance upon foreign legal systems for the purpose of comparison and in order to provide answers to the many unresolved problems of Spanish Private International Law, and a more than usual regard for the material to be found in treaties, whether bilateral or multilateral, were its outstanding merits.

The second volume deals with individual questions of choice of law, procedure, evidence, recognition and enforcement of foreign judgments, bankruptcy, legal assistance, foreign documents and international jurisdiction in criminal matters. In addition, the treaties bearing upon Private International Law concluded by Spain and the more important decisions of the Spanish Supreme Court are reproduced in appendices. Dr. Goldschmidt has written a remarkably clear and complete treatise on Spanish Private International Law which draws upon the author's systematic conclusions reached in his first volume without being dominated by the theoretical position which he took up there. He devotes considerable space to the discussion of the various connecting factors and then turns to discuss what he regards as the typical situations. These include all the questions which are normally dealt with in the special part of textbooks on the conflict of laws. In some respects it is a textbook which serves purely local needs. This applies particularly

[1] Of the Middle Temple, Barrister-at-Law; Member of the Spanish Bar; Legal Adviser to the Spanish Embassy.

[2] See *Journal of Comparative Legislation* (3rd ser.), vol. 31 (1949), p. 120.

to the chapters on marriage and nullity, parents and children, ownership in, and contracts relating to, ships, to mention only a few. On the other hand, contract, tort, property, especially property relations between husband and wife, succession, and judicial assistance are open to a broad treatment on comparative lines, and the author has seized his opportunity whenever it presented itself. It is most likely that this work will lead to cross-fertilisation. Spanish Private International Law, which is still little developed, will benefit much from Dr. Goldschmidt's exposition of the rules of Private International Law in other legal systems. Students of Private International Law outside Spain will be encouraged to reconsider their own system in the light of Dr. Goldschmidt's method of using treaties and diplomatic practice, his acute criticism of acknowledged concepts and his logical systematisation.

K. Lipstein.[3]

Guerra e Direito Internacional. By A. C. Raja Gabaglia. [São Paulo : Saraiva S/A. 1949. vii and 637 pp.]

This is a work published by a serving Brazilian naval officer with executive experience in World War II who is an instructor at the War College at Rio de Janeiro.

Part I (55 pp.) deals with the rules of warfare. Part II (pp. 56–87) sets out the international legislation on war and gives a bibliography thereon. Part III (pp. 88–166) is a most up-to-date discussion of the conduct of warfare, with emphasis on naval warfare. Part IV, which is the largest part of the book, gives in a convenient alphabetical arrangement the Portuguese substance of the laws of war, *i.e.*, manuals, treaties, conventions, etc., including the Geneva Convention of 1949 (pp. 167–618). The index takes up pp. 619–637.

The book is concerned with the conduct of war and in general is more expository than critical but we note with satisfaction the author regards the violent acquisition of territorial sovereignty to be condemned by the law of nations as a form of robbery between States (p. 117). The discussion of unconditional surrender (pp. 162 *et seq.*) contains interesting precedents.

The book is well produced and excellently printed, though we note a few misprints. At p. 7 the author should be Vanderpol, at p. 18 Hurst, at p. 122 Manisty, at p. 60 internacionaler should be internationaler. The account of the Graf Spee incident and its relation to ' security zones ' will be a fresh one to English readers. The Navicert system is reviewed shortly at p. 24; but we think a

[3] Fellow of Trinity College, Cambridge.

reference to Mr. Fitzmaurice's leading article on Contraband and Prize in *British Yearbook of International Law*, Vol. 23, p. 27, would have been useful in this part of the book; perhaps we are more concerned with this aspect of maritime war than are the Brazilians, we are more dependent on sea-borne supplies. The book is a convenient manual for military and naval officers. Its use will help to maintain the rule of law.

B. A. WORTLEY.[1]

Nordisk Tidsskrift for International Ret. Acta Scandinavica juris gentium. [1950. Vol. 20, Fasc. 1–2.]

THIS number contains articles in Danish by Erik Brüel, 'Efforts to Create an International Control Over Atomic Energy', in Danish and French by H. G. Bechmann, 'Meditations on the Occasion of the Suppression of an Institution of International Collaboration'—the institution in question is the Mixed Courts of Egypt—in Danish by Manley O. Hudson, 'The Twenty-Eighth Year of the International Court' (this appears also in the *American Journal of International Law*) and in Danish and English by F. Blains Sloan, 'Human Rights, the United Nations and International Law'. There are also the usual notes on international institutions, the International Court, and the Hague Academy of International Law, book reviews, collections of documents and a précis of foreign affairs.

F. H. LAWSON.[2]

Internationales Privatrecht Und Rechtsvergleichung. By A. N MAKAROV. [Tübingen : J. C. B. Mohr (Paul Siebeck). 1949. 44 pp.]

THIS is a short study, dedicated to the memory of Baron Nolde, of the relations between private international law and comparative law. The author discusses first comparative private international law and then the use of comparative law in the interpretation and application of rules governing the choice of law. His discussion contains a great deal of historical matter which is perhaps not very easily found elsewhere, and he sets out and criticises the various theories of classification, and the possibility of using comparative law in order to solve that very difficult problem.

F. H. LAWSON.

[1] Professor of International Law, University of Manchester.
[2] Professor of Comparative Law, University of Oxford.

Bulletin De Droit Tchecoslovaque. 1948–9. Année VI no. 1/2, VII no. 3/4.

This periodical deals for the most part with problems on the borderline between politics and law : problems of public law as it results from the constitution; of the legal position of Slovakia within the State; of the interpretation of the East-European concept of 'democracy'; problems concerned with the organisation of the State; of public corporations; of courts of law. It further deals with the organisation of the Bar, which—so we learn—has been '*débarassé de son ancien et odieux caractère capitaliste*' and has been replaced by an institution showing the 'right spirit of comradeship and mutual help'. Some of the contributions even descend to a low type of political journalism : probabilities or even mere possibilities are treated as facts. In the forest of Katyn the corpses of more than 6,000 murdered Polish officers were found. Had they been murdered by Russians or by Nazis? In the course of the trial of a German general the defendant's British counsel seems to have said that the murderers were Russians. A Czechoslovak attacks this statement in the most savage way : not content with pronouncing that Russian guilt has not been proved he positively asserts that the murderers had been Nazis; either statement may be true; neither has been proved.

A short article by Krob on the 'Recognition of Foreign Judgments in Matrimonial Matters' is more satisfactory.

The Journal is written in French but accompanïed by a Russian and an English 'Summary'.

Martin Wolff.[1]

Traité de Science Politique. By Georges Burdeau. Vol. 3. Le Statut du Pouvoir dans l'Etat. [Paris: Librairie Générale de Droit et de Jurisprudence. 1950. 620 pp. Price not stated.]

The third part of Professor Burdeau's ambitious and learned treatise covers comparatively familiar ground. He is concerned with the inter-relation of his two earlier concepts, Power and the State, and finds this in the Constitution. After discussing the theory of the Constitutions and their foundation, he examines at some length the notion of a constitution-making body, and some of the varied forms that have been adopted for constitutional revision. From this he passes to a study of the limitations that a constitution places upon the exercise of power and, in particular, the question of the constitutionality of laws under difficult French regimes and in the United States. The study of American practice is primarily

[1] All Souls College, Oxford.

based on the work of Edouard and Jacques Lambert. In insisting on the exclusively American character of the phenomenon of judicial review, Professor Burdeau would seem to overlook the material that the British Commonwealth provides on this important topic. As so often with French works, one is surprised to see how foreign a world that of the Commonwealth remains. Even on the American side, the picture given hardly takes into account the radical change that has come over the scene since the Supreme Court's retreat over the New Deal. A couple of sentences on the subject in a long chapter are hardly likely to capture the attention of any but the most careful reader.

The last part of the volume is devoted to a consideration of theories of resistance and of revolution itself, as well as of governments arising out of revolution. On the latter subject, and particularly on the international questions arising, Professor Burdeau attempts to take up a highly realistic standpoint, to the extent of contemning all distinctions between *de facto* and *de jure* recognition. He admits that in practice, political rather than judicial criteria are applied; but appears to believe that an objective criterion as to what a properly constituted and functioning government is, can be arrived at. But in order that a government should be, in his phrase, a ' gouvernement de fait ', he demands not only the control of territory and the enforcement of obedience but also that it should behave towards the subjects of the State in question according to the laws of universal morality. It is not excessive, he declares, to demand that it should conform to the principles of the Declaration of the Rights of Man adopted on December 10, 1948, by the United Nations. One has a feeling that a great many governments whose factual character has not been challenged would hardly come up to this scrutiny; and that, however hard one may try to produce a positive criterion, morality comes creeping in.

MAX BELOFF.[1]

Soviet Imperialism. Russia's Drive Toward World Domination. By E. DAY CARMAN. [Washington, D.C. : Public Affairs Press. 1950. 175 pp. $3.25.]

THE title of Mr. Carman's book, and still more its sub-title, might lead one to imagine that this book was a study of one of the cardinal questions in international relations, that of the foreign policy of the Soviet Union and its twin roots in the Russian past and in Communist ideology. In fact we have something much less far-reaching, a sort of case study of the way in which the territory of the Soviet Union has in fact been increased over the last decade. It assumes expansionism as a motive and, although the facts

[1] Reader in the Comparative History of Institutions, University of Oxford.

recounted are accurately enough set down, the tone is one of agitated propaganda rather than of sober scholarship. The bibliography and references are almost entirely to works in the English language, and there seems little attempt to produce any internally cohesive picture of Soviet policy. Indeed, the category of territorial aggrandisement which leaves out of account the role of satellite and occupied territories is an artificial one. There is a book to be written on Soviet foreign policy since 1939 or 1941; this is not it.

Max Beloff.

Land and The Executive in Britain. By Bernard Schwartz. [New York: New York University Press. Cambridge: at the University Press. 1949. viii and 388 pp. 45s.]

Professor Schwartz's writings on administrative law in England and in the United States are well known in this country. In this book he has provided a very useful account of administrative law in England. Though primarily addressed to an American audience, it is a book which may be read with profit in this country. The author draws frequently upon American practice and law in making comparisons between English and American approaches to problems of administrative law. He is very strongly influenced by the American emphasis on judicial review, and this is made evident in his critical comments on certain aspects of English administrative adjudication. Again, his criticism of *Liversidge* v. *Anderson* [1942] A.C. 206, which is expounded at length, derives from an emphatically expressed opinion that it was for the court to satisfy itself of the reasonableness of the Home Secretary's grounds for making the detention order. With this and with other points, there may be some, including the reviewer, who would disagree.

The book is clearly and interestingly written and is well produced. If there is a general criticism, it is that Professor Schwartz quotes too often from secondary sources; one feels at times that he quotes from a book when he could have made the same point more shortly in his own words. But the book is a useful addition to the literature on English administrative law.

Juvenile Delinquency. By Paul W. Tappan. [New York: McGraw Hill Book Company Inc. 1949. x and 613 pp. $5.00.]

Juvenile delinquency has become one of the universal problems of our time, something which affects the life of the community under

almost every legal system. For half a century the answer has been the Juvenile Court as it had originated in the United States, with its auxiliary services and the preference for educative treatment instead of retributive punishment. The publication of a new American textbook will therefore be welcomed everywhere. Professor Tappan, with his twofold experience in law and in social work, has written a comprehensive and penetrating study covering every aspect of that wide topic : amount and causes of delinquency, the juvenile court, probation, institutional training, prevention with the approach to the family, if not the community as a whole. All this refers mainly to conditions in the United States, though there are some observations on English juvenile courts and the Borstal system. The author's attitude can be characterised as critical realism. Legal and social institutions are not described in their ideal form as they had been conceived by theoretical considerations or legislative acts. From the very beginning he analyses present conditions as they are, and demonstrates imperfection, confusion and contradictions wherever they exist. We learn why it is almost impossible to assess accurately the present amount of American juvenile delinquency, and that the search for innumerable factors of crime will fail to disclose its causes unless we concentrate on typical combinations of factors, ' syndroms ' in medical terminology. Juvenile courts are confusing aspirations for social work with legal ends. Training institutions are crippled in their function by contradiction between punitive motives and the avowed educative intention. All this is not a mere theoretical contention, but an experience illustrated by many verbatim extracts from recent American reports and discussions. The critical approach confronts the reader at once with the world as its exists, with its unsolved problems and disappointing shortcomings, and compels him to take sides in the contest for radical action. A student of criminology, however, who is not familiar with American social and legal institutions will find it difficult to follow a critical discussion before being introduced to the typical patterns and design of the subjects under review.

Like Professor Tappan's previous study on *Delinquent Girls in Court* (1947), this book marks a new outlook on juvenile delinquency, a swinging of the pendulum from a social to a legal concept of the juvenile court. Ever since Judge Ben Lindsey and Miriam van Waters inaugurated the idea of ' socialisation of the court ' they have been hailed by penal reformers in Europe. In their desire to free the social and educative functions of the juvenile court from the fetters of criminal jurisdiction they have looked with admiration to the American solution (also accepted in Canada) where the juvenile is not brought before the court on a charge of a particular

offence, but as a delinquent. In Professor Tappan's view, however, this status of a delinquent involves no less a social censure and stigma, which are unjustified if social rather than legal considerations support the decision, and at the same time make a judicial disposition less effective than an untainted action of independent social agencies. He uses strong words against ' uncontrolled administrative discretion under omnibus statutes ' (222), and would prefer to see certain typical features of American juvenile courts abandoned such as informal adjustment, unofficial, while not judicially imposed probation, and pre-trial reports. Instead the better part of these informal court activities should be replaced by proper case work, the court should be ' a last resort ', especially when it is necessary ' to wield authority ', and if there is a court procedure the decision should be based on specific statutory provisions and supported by a high standard of proof (223). Such a policy would bring American law, in the author's own contention, more into line with English juvenile courts. The whole question of a re-allocation of functions between the judiciary and social administration has become even more significant in connection with the war and post-war problem of the treatment of adolescent offenders, *i.e.*, minors over juvenile court age. Recent developments in the United States present two different solutions. On the one hand, New York opened Adolescent Courts, consolidated by legislation in 1938. These courts apply juvenile court principles to certain types of adolescent offenders who, with the consent of their parents, may be adjudicated as ' wayward minors ' and put on probation or committed to an institution. On the other hand, in 1940, the American Law Institute published a Draft Model Youth Correction Authority Act intended to allocate the better part of the courts' sentencing power to a central State-wide Youth Correction Authority, a board of experts in direct touch with social and educational services. California, Wisconsin, Minnesota and Massachusetts followed with corresponding enactments, though with certain modifications in favour of the powers of the court. Professor Tappan wants to substitute for the dubious consent-procedure of the wayward-minor laws an ordinary procedure with full legal safeguards for the adjudication of ' youthful offenders '. With regard to the YCA he reserves his judgment until one sees whether in the light of experience the new plan proves only another ' under-financed moral gesture ', or works as a forceful impulse to an intense and co-ordinated use of appropriate clinical, classification, and rehabilitative facilities (280 *seq.*).

The critical exposition of recent American tendencies is a valuable contribution to the discussion in other countries. It may well be that, in one way or another, juvenile courts will have to

surrender certain of their functions to non-judicial case-work agencies, and regain some of the ground lost by extending their jurisdiction to higher age-groups where their outlook and experience, and the co-operation of auxiliary services at their disposal, will be very valuable. In Professor Tappan's book these are only some among many topics discussed. Of particular interest are the chapters on probation, in the author's view too often 'a sterile gesture of a too-penurious good will' (346), and on methods of institutional training where he works out details of an intense institutional programme from diagnosis and assignment to release and after-care (457–72). It is a stimulating book from which theoretical discussion and practical reform will benefit alike.

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LIST OF DOCUMENTS

I. Agreements and Other Documents

Convention between the United Kingdom and the Netherlands for the Avoidance of Double Taxation with respect to Duties on the Estates of Deceased Persons.[1] [Treaty Series 1950/44, October 15, 1948, Cmd. 8016.]

International Convention for the North-West Atlantic Fisheries.[2] [Treaty Series 1950/62, February 8, 1949, Cmd. 8071.]

Agreement on Trade and Payments between the United Kingdom Government and the Argentine Government. [Treaty Series 1950/66, June 27, 1949, Cmd. 8079.]

Agreement for the Establishment of a General Fisheries Council for the Mediterranean. [Miscellaneous 1950/12, September 24, 1949, Cmd. 8011.]

Protocol modifying the Convention of July 4, 1890, concerning the creation of International Union for the Publication of Customs Tariffs. [Treaty Series 1950/59, December 16, 1949, Cmd. 8050.]

Convention between the Government of the United Kingdom and the Government of Denmark for the Avoidance of Double Taxation, etc. [Treaty Series 1950/47, March 27, 1950, Cmd. 8023.]

Agreement on Trade and Payments between the United Kingdom Government and the Government of Paraguay. [Treaty Series 1950/45, April 3, 1950, Cmd. 8021.]

Exchange of Notes between the United Kingdom Government and the Government of Greece further modifying the Agreement of November 26, 1945, regarding Air Services in Europe. [Treaty Series 1950/46, May 9, 1950, Cmd. 8022.]

Exchange of Notes between the United Kingdom Government and the Italian Government further extending the Sterling Payments Agreement of November 26, 1948. [Treaty Series 1950/42, June 27, 1950, Cmd. 8014.]

Cultural Convention between the United Kingdom Government and the Government of the Grand Duchy of Luxembourg. [Luxembourg 1950/1, June 27, 1950, Cmd. 8013.]

Supplementary Protocol to the Agreement on the Status of Members of Armed Forces of the Brussels Treaty Powers of December 21, 1949. [Miscellaneous 1950/13, June 28, 1950, Cmd. 8057.]

[1] Ratification exchanged in London, July 18, 1950.

[2] This Convention was ratified by the Government of the United Kingdom on December 15, 1949.

Exchange of Notes between the United Kingdom Government and the Belgian Government further prolonging the Monetary Agreement of November 14, 1947. [Treaty Series 1950/49, June 30, 1950, Cmd. 8029.]

Exchange of Notes between the United Kingdom and the Brazilian Government regarding the effect of the Cultural Convention of April 16, 1947, upon the Entry and Residence of Foreigners. [Treaty Series 1950/50, June 30/July 3, 1950, Cmd. 8032.]

Exchange of Notes between the United Kingdom Government and the Italian Government further extending the Sterling Payments Agreement of November 26, 1948. [Treaty Series 1950/48, July 20/21, 1950, Cmd. 8024.]

Exchange of Notes between the United Kingdom Government and the Government of the United States of America modifying the Leased Bases Agreement of March 27, 1941. [Treaty Series 1950/65, July 19/August 1, 1950, Cmd. 8070.]

Exchange of Notes between the United Kingdom Government and the Government of Denmark prolonging until October 19, 1950, the validity of the Monetary Agreement of August 16, 1945, and the Exchange of Notes of November 10, 1948. [Treaty Series 1950/60, August 14/18, 1950, Cmd. 8055.]

Protocol for the Prolongation of the International Agreement regarding the Regulation of Production and Marketing of Sugar. [Treaty Series 1950/68, August 31, 1950, Cmd. 8086.]

Exchange of Notes between the United Kingdom Government and the Brazilian Government regarding Commercial Transactions. [Treaty Series 1950/63, September 18, 1950, Cmd. 8068.]

Agreement for the Establishment of a European Payments Union. [Miscellaneous 1950/14, September 19, 1950, Cmd. 8064.]

Exchange of Notes between the United Kingdom Government and the Italian Government further extending the Sterling Payments Agreement of November 26, 1948, and the provisions in respect of the Territory of Somaliland contained in the Exchange of Notes of July 20/21, 1950. [Treaty Series 1950/67, September 29, 1950, Cmd. 8085.]

Treaty between the Government of the United Kingdom and the Government of Nepal. [Nepal 1950/1, October 30, Cmd. 8077.]

Final Act of the Conference for the revision of the Geneva Convention of July 27, 1929, for the Relief of the Wounded and Sick in Armies in the Field, of the Xth Hague Convention of October 18, 1907, of the Convention of July 27, 1929, relative to the Treatment of Prisoners of War; and for the establishment of a Convention relative to the Protection of Civilian Persons in Time of War.[3] [Miscellaneous 1950/4, April 21/August 12, 1949, Cmd. 8033.]

[3] The text of the revised Convention and the new 'Civilian' Convention are annexed. H. M. G. has not yet ratified any of the 1949 Geneva Conventions.

Eighth Report on Operations under the Economic Co-operation Agreement between the Governments of the United Kingdom and the United States of America—covering the second calendar quarter of 1950. [Cmd. 8028.]

General Assembly of the United Nations, September 20/December 10, 1949—Memorandum on Proceedings relating to Non-Self-Governing and Trust Territories. [Cmd. 8035.]

Provisional Consolidated Text of the General Agreement on Tariffs and Trade and Texts of Related Documents. [Cmd. 8048.]

Summary of Events relating to Korea. [Cmd. 8078.]

II. Statutory Instruments

The Distribution of German Enemy Property (No. 1) Order, 1950. [No. 1642, October, 9.]

The North Borneo (Legislative Council) Order in Council, 1950. [No. 1643, October 9.]

The Gambia Legislative Council (Extension of Tenure of Offices) Order in Council, 1950. [No. 1644, October 9.]

The Somaliland Order in Council, 1950. [No. 1645, October 9.]

The British Honduras (Alteration of Boundaries) Order in Council, 1950. [No. 1649, October 9.]

The Patents, etc. (Dominican Republic) (Convention) Order, 1950. [No. 1653, October 9.]

The Trading with the Enemy (Authorisation) (Germany) Order, 1950. [No. 1728, October 27.]

The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (Germany) Order, 1950. [No. 1729, October 27.]

The Trading with the Enemy (Custodian) (Amendment) (Germany) Order, 1950. [No. 1730, October 27.]

III. United Nations Documents

Economic and Social Council.

Human Rights : Resolutions adopted in regard to the Report of the Commission on Human Rights. [E/1826, August 14, 1950.]

General Assembly.

Reservations to Multilateral Conventions—Report of the Secretary-General. [A/1372, September 20, 1950.]

Report of Sixth Committee. [A/1494, November 10, 1950.]

United Action for Peace—Report of the First Committee. [A/1456, October 25, 1950.]